(4)

No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 16, 1990
Certiorari Granted June 28, 1990

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RELEVANT DOCKET ENTRIES OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND
CASE NO. 88-0628 S

DATE	DOCKET ENTRY
10/3/85	Complaint filed.
10/21/85	Answer of defendants.
8/14/86	Amended Complaint filed.
11/17/86	Opinion and Order re: Motion for Summary Judgment granted in part, denied in part. As to the counts upon which defendants have prevailed, entry of final judgment shall be withheld pending disposition of remaining claims entered. (Counts II, V, VI, VII and VIII granted; Counts I, III and IV denied).
2/13/87	Joint Statement.
4/6/89	TRIAL: Day No. 1; Attorneys – Plaintiff/ Edward Hogan; Defendants/Steven E. Snow, jury sworn, foreperson/Helen Enos. Pre-instructions given, plaintiff's opening, defendants' opening, one witness, 25 exhibits.
4/7/89	TRIAL: Day No. 2; Attorneys and jurors present, witness #1 continued. Fifty-four exhibits.
4/10/89	TRIAL: Day No. 3; Attorneys and jurors present, four exhibits, three witnesses.
4/11/89	TRIAL: Day No. 4; Attorneys and jurors present, six witnesses, 14 exhibits, plaintiff rests and defendants' Motion for Directed Verdict was heard; on Count I, motion was denied, will go to jury. On Count III, directed verdict for all defendants. On Count IV, directed verdict for all defendants.
4/12/89	TRIAL: Day No. 5; Attorneys and jurors present, defendant's case; three witnesses, two exhibits.

4/13/89 TRIAL: Day No. 6; Attorneys and jurors present, two witnesses, one exhibit.

4/14/89 TRIAL: Day No. 7; Attorneys and jurors present, defendants' Motion for a Directed Verdict for College is denied. Charging conference held, closing arguments heard. Jury instruction given, jury deliberations to be resumed 9:00 a.m. on 4/17.

4/17/89 TRIAL: Day No. 8; Jury returned to deliberate @ 9:00, verdict was for the plaintiff in the amount of $30,513.40 plus interest @ 12% per annum from August 21, 1985 to April 17, 1989 totaling $14,295.01 for a total judgment of $44,808.41.

4/17/89 Judgment entered, mailed.

4/27/89 Defendant's Motion for Judgment NOV, New Trial, for Remittitur and Amendment of Judgment.

5/22/89 Hearing: Attorneys – plaintiff/Edward Hogan; defendants/Steven E. Snow, defendants present. Defendants' Motion for NOV was denied. Defendants' Motion for a New Trial with Remittitur was denied. Defendants' Motion to Amend Judgment was granted. Judgment will be entered in the amount of $43,903.45 ($30,513.40 plus interest @ 12% per annum from August 21, 1985 to April 17, 1989 totaling $13,390.05, post-judgment interest will apply). Defendants requested a stay, both sides in agreement that stay is for both sides. Attorney Hogan to do order.

5/22/89 AMENDED JUDGMENT; Entered.

5/23/89 ORDER: Defendant Salve Regina College's Motion for Judgment NOV is denied; defendant Salve Regina College's Motion for a New Trial is denied; defendant Salve Regina's Motion for Remittitur is denied; defendant

Salve Regina's Motion for Amendment of Judgment is granted; execution of Judgment is stayed pending appeal and neither party need post a supersedeas bond in connection with appeal or crossappeal, by agreement. Entered.

6/5/89 Notice of Appeal.

6/6/89 Pleadings sent to Court of Appeals with transcripts.

RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IN CASE NO. 89-1564

DATE	DOCKET ENTRY
6/8/89	Record on appeal consisting of one volume received and filed. Case docketed.
10/3/89	Heard before Justices Bownes, Torruella and Timbers.
11/20/89	Judgment: The judgment of the District Court is affirmed. Opinion of the Court by Timbers, J. No costs. Notices mailed.
12/4/89	Petition for Rehearing and Suggestion for Rehearing En Banc, received and filed.
1/16/90	ORDER: (Campbell, Chief Judge, Bownes, Breyer, Torruella, Cyr and Timbers, J.J.) denying the Petition for Rehearing and the Suggestion for Rehearing En Banc. Notices mailed.
1/24/90	Mandate issued, copy filed, original papers returned to District Court. Notices mailed.
5/2/90	Notice of filing Petition for Certiorari to the Supreme Court (89-1629) April 16, 1990, received and filed.
7/2/90	Order from the Supreme Court (June 28, 1990) granting the Petition for Writ of Certiorari limited to Question 1 presented by the petition received and filed.

AMENDED COMPLAINT FILED AUGUST 14, 1986
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL, Plaintiff :
:
VS. : C.A. No.
: 85-0628-S
SALVE REGINA COLLEGE; :
CATHERINE E. GRAZIANO, :
individually and in her :
capacity as a faculty member and as :
Dean of the Salve Regina Nursing :
Department; JOAN CHAPDELAINE, :
individually and in her :
capacity as a faculty member :
and Clinical Agency :
Coordinator for the Nursing :
Department at Salve Regina :
College; MARY LAVIN, :
individually and in her :
capacity as a faculty member :
at Salve Regina College; :
MAUREEN HYNES, individually :
and in her capacity as a :
faculty member at Salve :
Regina College; BARBARA DEAN, :
individually and in her :
capacity as a faculty member :
at Salve Regina College. :
:
Defendants :

AMENDED COMPLAINT

Plaintiff, for her Complaint and cause of action, states and alleges:

1. That the Plaintiff, Sharon L. Russell (hereinafter called Plaintiff) is a resident of East Hartford, Connecticut.

2. That the Defendant Salve Regina College (hereinafter referred to as the Defendant College) is a corporation organized and existing under the laws of the State of Rhode Island with its principal place of business in Newport, Rhode Island.

3. That the Defendant, Catherine E. Graziano resides in the state of Rhode Island and served as a faculty member, Dean, and Chairman of the Defendant college nursing department at the time Plaintiff was aggrieved.

4. That the Defendant, Joan Chapdelaine, resides in the state of Rhode Island and served as a faculty member and clinical agency coordinator in the Defendant college nursing department at the time the Plaintiff was aggrieved.

5. That the Defendants, Mary Lavin, Maureen Hynes, and Barbara Dean reside in the state of Rhode Island and served as members of the college faculty and/or administration at the time Plaintiff was aggrieved.

6. That Plaintiff asserts this Honorable Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1332 (Diversity of Citizenship); 42 U.S.C. §1985 (Civil Rights); 29 U.S.C. §794 (Discrimination); and personal jurisdiction of the Defendants upon the location and/or residence of each of the above named Defendants, including the Defendant College mentioned in paragraph 2 hereof. All Defendants reside and exist in the District of Rhode Island and within the limits of the United States

District Court for the District of Rhode Island. The matter in controversy exceeds, exclusive of interests and costs, the sum of TEN THOUSAND ($10,000.00) dollars.

7. That the Plaintiff was accepted by and enrolled in the Defendant College's nursing program for the college semester beginning on or about September 1982.

8. That the Plaintiff completed her freshman, sophmore [sic] and junior years in said nursing program with the Defendant College as an honor student.

9. That for each of said years mentioned in paragraph 8 hereof the Plaintiff paid her tuition in a timely fashion; complied with all the rules and regulations of the Defendant College and the nursing department of said Defendant College and was in no way a disciplinary problem at said Defendant College.

10. That, for a long time prior to and during Plaintiff's junior year, Plaintiff was vindictively, maliciously and outrageously tormented and harassed, in a calculated and systematic fashion, by the Defendant faculty members and administrators referred to in paragraphs 3, 4 and 5, hereof acting within and without the scope of their authority as faculty members and administrators of the Defendant College; in that they continually, and without respite, harassed, harangued and barged at the Plaintiff concerning her being overweight and thus, in their words, and by their proclamation, she was a "disgrace to" and "did not fit the image of" the Defendant College and its nursing program.

11. That during, or about, October 1984, the Defendants Graziano and Lavin, acting within the scope of

their authority as faculty members of the Defendant College, confronted the Plaintiff with a document, and demanded that she sign the same, by the terms of which the Plaintiff was to agree to lose a minimum of two (2) pounds per week, effective immediately, under the threat that she would be dismissed from the Defendant College's nursing program, unless she followed this arbitrarily dictated regimen. Plaintiff refused to submit to such pressure and did not sign said document, but did, at the direction and demand of said Defendants, join "Weight Watchers" at her personal expense, and she did further at said demand and direction of said Defendants reluctantly say she would meet with the Defendant Lavin, on a weekly basis, to proclaim her successful weight loss during the preceding week, or confess her failure in this regard.

12. That, on or about December 18, 1984, immediately after Plaintiff had finished one semester exam, and while faced with another semester exam the following day, the Defendants Graziano and Lavin, acting within the scope of their authority as faculty members of the Defendant College, ordered the Plaintiff to report to the Defendant Graziano's office; there they told Plaintiff to sign a document whereby Plaintiff was to lose a minimum of two (2) pounds per week and be scrutinized weekly by the Defendant Chapdelaine, or, in the alternative, she would not be able to return to the nursing program for the next semester regardless of her grades, honor student standing, or other academic competency. The Plaintiff, distraught, distressed, and traumatized beyond the point where any twenty year old student

should be reasonably expected to make sound and prudent judgments, signed said document. A copy of this unilaterally dictated paper is attached hereto, made a part hereof and marked Exhibit A.

13. That, thereafter, and without waiting for a reasonable period of time to elapse so as to determine whether the Plaintiff was meeting those arbitraily imposed standards, the Defendant faculty members referred to in paragraphs 3, 4 and 5 hereof, acting within and without the scope of their authority for the Defendant College, continued, for the remainder of her junior year, to torment and harass her concerning her weight; continued to refer to the compact of December 18, 1984; and kept up a barrage of admonitions that the Plaintiff "did not portray the image of" the Defendant College or its nursing program and "no one will ever hire you at your weight".

14. That as a result of said actions referred to in paragraphs 10-13 hereof Plaintiff became physically ill, to the point of vomiting, lost sleep and suffered from severe nervousness and anxiety, and concern as to her future career; was subjected to ridicule, embarrassment, humiliation and degradation in the eyes of, and at the hands of, her peers and contemporaries, as well as other members of the Defendant College's faculty. This torment, humiliation, degradation and harassment continued through the summer of 1985.

15. That despite this concerted effort on the part of the Defendants to denigrate and humiliate her, and in the face of the never ceasing chiding about, and harassment

as to her weight, the Plaintiff successfully maintained honor grades for the spring semester of her junior year.

16. That, the Plaintiff did, on or about August 20, 1985, forward her tuition check for the Fall Semester 1985. Said check has been received and cashed by the defendant College.

17. That on or about August 23, 1985, the Plaintiff received a letter from the Defendant Chapdelaine who was acting within the scope of her authority as a faculty member of the Defendant College advising Plaintiff that, predicated upon the writing of December 18, 1984, she was no longer enrolled in the Defendant College nursing program. A copy of said letter is attached hereto, made a part hereof and is marked Exhibit B.

18. That, in addition to the severe physical, mental and emotional anguish, suffering and distress Plaintiff has experienced and will continue to experience as a result of the Defendant Faculty members actions as set forth above, the Plaintiff has suffered permanent and lasting impairment to her education, employment and career. By virtue of the Defendant College's arbitrary refusal to allow her to return for her senior year in the nursing program, she has been required to pursue her education elsewhere, at a sacrifice of at least one full year's credit and time toward her degree, plus the related costs and expenses of such extra study; she has lost an opportunity for full time employment, and the wages associated therewith, as a nurse in June 1986, which position had been offered her based upon her projected successful completion of education and obtainment of her

nursing degree from the Defendant College in, or about, May 1986.

COUNT I

(CONTRACT)

19. (a) Plaintiff realleges paragraphs 1-18 hereof of this Complaint as if set forth in full herein.

(b) Plaintiff alleges that it was an express and/or implied term, condition and provision of her contract, covenant and terms of educations with the Defendant College that if Plaintiff maintained her grades and academic standing, was not a disciplinary problem and otherwise complied with the rules and regulations of the Defendant College and its nursing program, the Plaintiff would be allowed to continue her nursing education at and receive her nursing degree from the Defendant College and further be treated civilly and not be tormented, or harassed by the Defendant College and the Defendant faculty members.

(c) Plaintiff alleges that the Defendant College breached the express and/or implied terms, conditions and provisions of the contract with Plaintiff by its actions and/or the actions of the Defendant faculty members acting within the scope of their authority as set forth in paragraphs 10-18 hereof.

COUNT II

(COVENANT OF GOOD FAITH AND FAIR DEALING)

20. (a) Plaintiff realleges paragraphs 1-18 hereof and sub-paragraphs (b)-(c) of Count I, paragraph 19 of this Complaint as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and/or its faculty members acting within and without the scope of their authority breached and violated the express and implied covenants of good faith and fair dealing contained in Plaintiff's contract, covenant and terms of education with the Defendant College by its actions as set forth in paragraphs 10-18 hereof.

COUNT III

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

21. a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators, because of their position and relationships with the Plaintiff, owed the Plaintiff a special duty of care and/or had a fiduciary obligation with respect to Plaintiff.

(c) That the Defendant College, through the Defendant faculty members and administrators, acting within and without the scope of their authority specifically and intentionally inflicted upon Plaintiff gross and severe mental and emotional distress and suffering by their utterly reprehensible and outrageous conduct toward Plaintiff, as outlined in paragraphs 10-18 hereof.

COUNT IV

(INVASION OF PRIVACY)

22. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I paragraph 19 hereof.

(b) Plaintiff alleges that the Defendant College through the Defendant faculty members acting within and without the scope of their authority, specifically and intentionally invaded and intruded upon Plaintiff's seclusion and privacy rights by their patently unreasonable, offensive and intrusive conduct as set forth in paragraphs 10-18 hereof.

COUNT V

(WRONGFUL DISMISSAL)

23. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators wrongfully dismissed and discharged Plaintiff from the Defendant College's nursing program as set forth in paragraphs 1-18 hereof; that said dismissal and discharge violates public policy; that said dismissal and discharge was motivated by bad faith; that said dismissal and discharge was malicious and based upon a socially undeniable motive.

(c) Plaintiff alleges that she has no remedy to protect her interests or the interests of society.

COUNT VI

(DUE PROCESS)

24. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College is a public college and/or operates as does a public college and/or university and/or receives both federal and state financial assistance and as such constitutes "state activity".

(c) Plaintiff alleges that she has a constitutionally protected property interest in her education as a nursing student and career potential as a registered nurse.

(d) Plaintiff alleges that she has a constitutionally protected liberty interest in her reputation as to her professional integrity and ability as a nursing student and potential career as a registered nurse.

(e) Plaintiff alleges that the Rules and Regulations of the Defendant College and of its nursing department and/or the mutually explicit or implied understandings of continued education as set forth in Count I, paragraph 19 hereof constitutes a constitutionally protected liberty and/or property interest.

(f) Plaintiff alleges therefore, that the actions of the Defendant College, through the Defendant faculty members and administrators, as set forth in paragraphs 10-18 hereof, particularly the dismissal of the Plaintiff from the Defendant College's nursing program without notice, hearing, and/or an opportunity to defend herself, violates the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 in that said action deprived Plaintiff of property and/or constitutionally protected interests without due process of law, more specifically, the decision to dismiss Plaintiff from the nursing program for being overweight, the failure to

give her notice, hearing and an opportunity to defend herself:

(i) was arbitrary, and capricious in that it was based on unlawful and irrelevant criteria:

(ii) was made without notice of the reasons for her dismissal, proper hearing and/or opportunity for Plaintiff to defend herself in accordance with generally accepted principles of fundamental fairness and due process.

(iii) was based upon unlawful criteria which differed from that uniformly applied to previous students in said Defendant Colleges nursing department.

COUNT VII

(DISCRIMINATION)

25. (a) Plaintiff repeats and re-alleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and/or its nursing program received federal financial assistance.

(c) Plaintiff alleges that she is a qualified handicapped individual as defined in 29 U.S.C. §706 (7).

(d) Plaintiff alleges that solely by reason of her handicap she was excluded from participation in, and denied the benefits of participating in the Defendant Colleges nursing program as set forth in paragraph 1-18 hereof and was thereby subject to discrimination.

(e) Plaintiff alleges that she has set forth a cause of action under 29 U.S.C. §794.

COUNT VIII

(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

26. (a) Plaintiff repeats and realleges paragraphs 1-18 hereof and sub-paragraphs B-C of Count I, paragraph 19 hereof as if set forth in full herein.

(b) Plaintiff alleges that the Defendant College and the Defendant faculty members and administrators, because of their position and relationships with the Plaintiff, owed the Plaintiff a special duty of care and/or had a fiduciary obligation with respect to Plaintiff.

(c) That the Defendant College, through the Defendant faculty members and administrators, acting within and without the scope of their authority negligently inflicted upon Plaintiff gross and severe mental and emotional distress and suffering by their negligent conduct toward Plaintiff, as outlined in paragraphs 10-18 hereof.

WHEREFORE, Plaintiff prays for judgment against the Defendant College and the other individual Defendants named herein for:

1. Injunctive relief as this Honorable Court deem appropriate under the circumstances.

2. General damages in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

3. Special damages in the amount of ONE MILLION ($1,000,000.00) DOLLARS.

4. All costs and expenses of this action including a reasonable attorneys fee for the prosecution of this claim.

5. Such other and further relief as this Honorable Court shall deem meet and just.

SHARON L. RUSSELL

By her attorneys,
HOGAN & HOGAN

/s/ Edward T. Hogan

/s/ Donald J. Packer

Edward T. Hogan, Esquire
Donald J. Packer, Esquire
HOGAN & HOGAN
201 Waterman Avenue
East Providence, RI 02914
(401) 421-3990

WHEREFORE, Plaintiff demands a trial by jury.

SHARON L. RUSSELL

By her Attorneys,
HOGAN & HOGAN

/s/ Edward T. Hogan,

/s/ Donald J. Packer,

Edward T. Hogan, Esquire
Donald J. Packer, Esquire
HOGAN & HOGAN
201 Waterman Avenue
East Providence, RI 02914
(401) 421-3990

DATED: August 13, 1986

CERTIFICATION

I hereby certify that I mailed a copy of the within Amended Complaint to Steven E. Snow, Esq. and Douglas A. Giron, Esq., One Old Stone Square, Providence, RI on August 14, 1986.

/s/ Janice K. Mulhern

EXHIBIT A

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.
2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25th, 1985.

   NB – Report January 22nd for first accounting after the holiday.
3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russell
Sharon Russell

Dec 18, 1984
Date

/s/ Catherine E. Graziano, RN.
Witness

EXHIBIT B

SALVE REGINA THE NEWPORT COLLEGE
NEWPORT, RHODE ISLAND 02840

August 21, 1985

Sharon Russell
31 Andover Road
East Hartford, CT 06108

Dear Sharon:

Per our telephone discussion of today (8/21/85) I have again reviewed the conditions of the contract that you signed on December 18, 1984.

Since you have not met the conditions for entering 411, I have removed your name from 411 in accordance with your agreement to "voluntarly" withdraw from the Nursing Program if conditions were not met.

Sincerely,

/s/ Joan Chapdelaine
Joan Chapdelaine
Clinical Agency Coordinator
Department of Nursing

Enclosure

VC:bqt

ANSWER TO AMENDED COMPLAINT
FILED AUGUST 22, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL	:	
	:	C.A. No.
v.	:	85-0628-S
SALVE REGINA COLLEGE, et al.	:	

ANSWER TO AMENDED COMPLAINT

Now come defendants in the above-captioned action, and hereby respond to the allegations contained in the plaintiff's amended complaint as follows:

FIRST DEFENSE

1. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 1 of the amended complaint.

2. Defendants admit that Salve Regina College is a non-profit tax exempt, religiously affiliated educational institution incorporated by special act of the Rhode Island General Assembly with its principal place of business in Newport, Rhode Island.

3. Defendants deny that Catherine E. Graziano is now or ever has been Dean of the Nursing Department and denies that plaintiff has been aggrieved but otherwise admits the allegations of paragraph 3.

4. Defendants deny that plaintiff has been aggrieved but otherwise admit the allegations of paragraph 4.

5. Defendants deny the Barbara Dean resides in the state of Rhode Island and deny that plaintiff has been aggrieved, but otherwise admit the allegations of paragraph 5.

6. Defendants deny each and every allegation of Paragraph 6 of the amended complaint.

7. Defendants deny the allegations of paragraph 7 of the amended complaint.

8. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 8 of the amended complaint.

9. Defendants lack sufficient information to form a belief as to the truth of the matters asserted in paragraph 9 of the amended complaint.

10. Defendants deny each and every allegation contained in Paragraph 10 of the amended complaint.

11. Defendants deny the allegations in paragraph 11 of the amended complaint.

12. Defendants deny the allegations of paragraph 12, except admit that plaintiff entered into an agreement with the College and that a copy of said agreement is attached to plaintiff's amended complaint as Exhibit A. Defendants aver affirmatively that Plaintiff entered voluntarily into said agreement.

13. Defendants deny the allegations of paragraph 13.

14. Defendants deny the allegations of Paragraph 14.

15. Defendants deny the allegations of paragraph 15.

16. Defendants admit the allegations of paragraph 16.

17. Defendants admit the genuineness of Exhibit B to plaintiff's amended complaint, but deny plaintiff's conclusions alleged in paragraph 17 of the amended complaint.

18. Defendants deny the allegations of paragraph 18 of the amended complaint.

COUNT I

19. Defendants deny each and every allegation of Paragraph 19 of the amended complaint.

COUNT II

20. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny each and every allegation of Paragraph 20 of the amended complaint.

COUNT III

21. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of Paragraph 21 of the amended complaint.

COUNT IV

22. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of Paragraph 22 of the amended complaint.

COUNT V

23. Defendants deny each and every allegation of paragraph 23 of the amended complaint.

COUNT VI

24. Defendants deny each and every allegation of paragraph 24 of the amended complaint.

COUNT VII

25. Defendants deny each and every allegation of paragraph 25 of the amended complaint.

COUNT VIII

26. Defendants admit that the defendant faculty members were at all times acting within the scope of their authority, but otherwise deny the allegations of paragraph 26 of the amended complaint.

WHEREFORE, defendants demand that the court enter judgment for defendants, and that the court dismiss the plaintiff's amended complaint, with prejudice and without costs, awarding defendants their costs of suit,

plus reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

AFFIRMATIVE DEFENSES AND OTHER DEFENSES
SECOND DEFENSE

The amended complaint fails to state any claim against any of the individual defendants, Catherine E. Graziano, Joan Chapdelaine, Mary Lavin, Maureen Hynes, and Barbara Dean, inasmuch as the amended complaint asserts that said defendants were at all times acting within the scope of their employment by a disclosed Principal, defendant Salve Regina College.

THIRD DEFENSE

At no time have Salve Regina College or the individual defendant faculty members acted under color of state law, and therefore Count VI fails to state a claim upon which relief can be granted and said defendants are not subject to suit under 42 U.S.C. § 1983, the Fifth Amendment, or the Fourteenth Amendment to the United States Constitution.

FOURTH DEFENSE

Count VII of the amended complaint alleging handicap discrimination fails to state a claim upon which relief can be granted inasmuch as plaintiff is not an otherwise qualified handicapped individual within the meaning of either Section 504 of the Rehabilitation Act of 1973, or the regulations promulgated thereunder.

FIFTH DEFENSE

The Nursing Program at Salve Regina College is not a postsecondary education program or activity subject to Section 504 of the Rehabilitation Act of 1973.

SIXTH DEFENSE

Plaintiff voluntarily agreed to accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not plaintiff could function in the clinical area due to health problems. Moreover, Plaintiff agreed that she had health problems which interfered with her functioning in the nursing curriculum and voluntarily agreed to withdraw from the nursing curriculum if such health problems were not remedied. Plaintiff's failure or refusal to abide by the terms of her agreements and understandings with the College led to her temporary withdrawal from the nursing curriculum.

SEVENTH DEFENSE

Defendants plead the defenses of waiver and estoppel.

EIGHTH

The plaintiff has failed to exhaust her administrative remedies.

NINTH DEFENSE

This court lacks subject matter jurisdiction.

TENTH DEFENSE

Each and every count of the amended complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants demand that the court enter judgment for defendants, and that the court dismiss the plaintiff's amended complaint, with prejudice and without costs, awarding defendants their costs of suit, plus reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

SALVE REGINA COLLEGE,
CATHERINE E. GRAZIANO,
JOAN CHAPDELAINE,
MARY LAVIN,
MAUREEN HYNES, and
BARBARA DEAN

By their attorneys,
TILLINGHAST, COLLINS & GRAHAM

/s/ Steven E. Snow

/s/ Douglas A. Giron
Steven E. Snow
Douglas A. Giron
One Old Stone Square
Providence, RI 02903
(401) 456-1200

Dated: August 21, 1986

DEMAND FOR JURY TRIAL

Defendants demand trial by jury on all counts triable by jury.

/s/ Steven E. Snow

/s/ Douglas A. Giron
Steven E. Snow
Douglas A. Giron
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, RI 02903
(401) 456-1200

Dated: August 21, 1986

Sharon L. RUSSELL, Plaintiff,

v.

SALVE REGINA COLLEGE; Catherine E. Graziano, individually and in her capacity as a faculty member and as Dean of the Salve Regina College nursing department; Joan Chapdelaine, individually and in her capacity as a faculty member and clinical agency coordinator for the nursing department at Salve Regina College; Mary Lavin, individually and in her capacity as a faculty member at Salve Regina College; Maureen Hynes, individually and in her capacity as a faculty member at Salve Regina College; Barbara Dean, individually and in her capacity as a faculty member at Salve Regina College; Joann Mullaney, individually and in her capacity as a faculty member at Salve Regina College; and Sheila Megley, individually and in her capacity as a faculty member at Salve Regina College, Defendants.

Civ. A. No. 85-0628-S.

United States District Court,
D. Rhode Island.

Nov. 17, 1986.

OPINION AND ORDER

SELYA, District Judge.

This case, brought under diversity jurisdiction, 28 U.S.C. § 1332(a),[1] raises a host of intriguing federal and

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[1] Although the plaintiff has premised jurisdiction alternatively on 28 U.S.C. § 1331, her "federal question" claims necessarily march across unsteady ground. *See Part III, post.* But, inasmuch as Russell, on the one hand, and all of the defendants, on the second hand, are citizens of different states,

(Continued on following page)

state law questions in an exotic factual context. Briefly put, the plaintiff, Sharon Russell, a citizen and resident of East Hartford, Connecticut, was expelled from Salve Regina College ("Salve" or "College") because of her unwillingness and/or inability to control an extreme chronic weight problem. She now sues for damages. The defendants include the College and some seven Salve officials. The identity of each individual defendant and the relationship of each to the College is recounted with fidelity in the case caption, *see ante*, and it would be pleonastic to restate that data anew. The case turns on the scope of the College's unilateral authority to dismiss a student and on the matter in which the expulsion was effected in this instance.

The plaintiff's amended complaint contains some eight distinct statements of claim. The defendants have moved for summary judgment, Fed.R.Civ.P. 56(c), as to each and all of Russell's initiatives. The matter has been plethorically briefed and vigorously argued. The applicable legal standard is by now firmly embedded in federal jurisprudence; in the interests of expedition, the court merely reiterates what it said at an earlier date in *Gonsalves v. Alpine County Club*, 563 F.Supp. 1283, 1285 (D.R.I.1983), *aff'd*, 727 F.2d 27 (1st Cir.1984):

> It is well settled that summary judgment can be granted only where there is no genuine issue as to any material fact and where the movant is

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and more than the requisite minimum amount is arguably in controversy, there is no authentic need to consider the plausibility of federal question jurisdiction.

entitled to judgment as a matter of law. *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 986 (1st Cir.1983); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir.1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); *United Nuclear Corp. v. Cannon*, 553 F.Supp. 1220, 1226 (D.R.I.1982); *Milene Music, Inc. v. Gotauco*, 551 F.Supp. 1288, 1292 (D.R.I.1982). In determining whether these conditions have been met, the Court must view the record in the light most favorable to the party opposing the motion, *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d at 986; *John Sanderson & Co. (WOOL) Pty. Ltd. v. Ludlow Jute Co.*, 569 F.2d 696, 698 (1st Cir.1978), indulging all inferences favorable to that party. *Santoni v. Federal Deposit Insurance Corp.*, 677 F.2d 174, 177 (1st Cir.1982); O'Neill v. Dell Publishing Co., 630 F.2d 685, 686 (1st Cir. 1980).

With this preface, the court proceeds to narrate the undisputed facts,[2] to frame the issues more precisely, and to set forth its findings and conclusions.

I. BACKGROUND

Salve is a religiously affiliated college located in Newport, Rhode Island, administered by the Sisters of

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[2] The facts utilized by the court are drawn from the affidavits and documentary proffers of records, and from the parties' statements of material facts not in dispute. *See D.R.I.L.R. 12.1, the text of which has been quoted in pertinent part in McInnis v. Harley-Davidson Motor Co., Inc.*, 625 F.Supp. 943, 946-47 n. 2 (D.R.I.1986). As is required at this stage of the proceedings, the court has refrained from making credibility judgments, but has accepted the record at fact value, indulging all contradictions and inferences in the perspective most flattering to the plaintiff.

Mercy of the Roman Catholic Church. Russell was admitted to the College by early decision in the winter of 1981-82. She began her studies in September 1982. Russell's interest in a nursing career antedated her matriculation: she had applied only to colleges with nursing programs and had expressed her intention to pursue such a course of study both in her original application to Salve and in her admissions interview. She commenced her academic endeavors at the College with the avowed intention to gaining admittance to Salve's program of nursing education.[3]

During her inaugural year at the College, there is rather fragile evidence that Russell sought some treatment for obesity. At various times during that school year, her 5' 6" frame recorded weights between 306 and 315 pounds according to data on file at the College's health services unit. It is plain that, although she achieved no meaningful weight loss during her freshman year, Russell was considerably more successful as a student. Her work in liberal arts courses was adequate and her grades were respectable. Consequently, Russell was admitted to the nursing program, effective at the start of her sophomore year. She was given a copy of the "Nursing Handbook" (Handbook) issued by the College, and clearly understood that the Handbook set out the requirements for successful completion of the degree in nursing.

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[3] Though the record is less than explicit, it appears that Salve requires students to undergo a minimum of one year in a liberal arts curriculum before undertaking a nursing concentration.

The fabric of Russell's aspirations began to unravel in the fall of 1983, when she entered her sophomore year (her first as a nursing student per se). The parties have presented an intricate (and sometimes conflicting) history of the interaction between the plaintiff and her sundry academic supervisors. It would serve no useful purpose at this juncture fully to recapitulate those events, or to attempt to reconcile every conflict. After all, the mechanism of Rule 56 does not require that there be no unresolved questions of fact; it is sufficient if there are no genuine issues remaining as to any *material* facts.

It suffices for the moment to say that there were myriad problems along the way: the agonizing search for uniforms and scrub gowns that would fit a woman of Russell's girth; a tendency on the part of faculty members to employ Russell in order to model hospital procedures incident to the care of obese patients; prolonged lectures and discussions about the desirability of weight loss; and so on and so forth. Indeed, the record reveals a veritable smorgasbord of verbal exchanges characterized by one side as "torment" or "humiliation" and by the other as "expressions of concern" or "forthright statements of school policy." (It takes little imagination to decipher which litigants are wont to apply which epithets to which actions.)

The court recognizes, or course, that sadism and benevolence – like beauty – often reside principally in the eye of the beholder. And, the court has neither the need nor the means to attempt to discern the subjective motives of myriad actors on the cold, fleshless record of a Rule 56 motion. For the purposes at hand, it is enough to acknowledge that an array of such incidents occurred and

that, by the end of her sophomore year, Russell's size had become a matter of concern for all the parties.

In her junior year, the plaintiff executed a contract (Contract) purporting to make her further participation in the College's nursing curriculum contingent upon an average weight loss to two pounds per week. The Contract was a singular sort of agreement. (It is reproduced in full as an appendix to this opinion.) Notwithstanding the signing of the Contract, Russell proved unable to meet the commitment, or even closely to approach it. Her body weight never fell appreciably below 300 pounds. Though the circumstances are complex, she seems to have made – and invariably to have broken – a series of promises in this regard. Predictably, an escalating level of tension began to characterize dealings between Russell and certain of the individual defendants.

The climax occurred on or about August 23, 1985. The plaintiff received a letter from the coordinator of the nursing program, defendant Chapdelaine, advising that she had been dismissed from the nursing department and from the college. Russell's education was concededly interrupted at that point (though, after a year's hiatus, she resumed her studies in nursing at another institution).

II. STATEMENT OF THE CASE

Russell's complaint, as noted above, contains an octet of claims. Two of these supposed causes of action – Counts VI and VII – allege "federal" claims. Count VI charges the defendants with a denial of due process and

an unconstitutional interference with the plaintiff's protectible [sic] liberty and property interest. Count VII alleges handicapped discrimination in derogation of 29 U.S.C. § 794.

The remaining six counts implicate state law, and the parties (who agree on little else) concur that Rhode Island law governs in this diversity case. The state law claims possess a variety of characteristics. Two of these initiatives are contract-based: Count I alleges nonperformance of an agreement to educate and Count II asserts breach of an implied covenant of good faith and fair dealing. Three of the remaining state law initiatives are tort-based: Counts III and VIII posit intentional and negligent infliction of emotional distress, respectively; and Count IV remonstrates against a perceived invasion of Russell's privacy. Count V – which seeks redress for wrongful dismissal – is a contract/tort hybrid.

It is alleged throughout that the plaintiff lost a year of prospective employment in a job which she claims to have been offered contingent upon successful completion of her nursing degree. Russell seeks compensatory damages for this delay and for the physical and emotional trauma which she purportedly suffered as a result of what she views as the callous, humiliating, and wrongful conduct of the several defendants. The plaintiff also prays for exemplary damages, counsel fees, and costs.[4]

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[4] The complaint, though amended as recently as June 1986, continues to pray for unspecified injunctive relief. This prayer seems largely academic at the moment. The plaintiff has pursued her studies elsewhere, *see ante*, and has manifested no enduring desire to obtain reinstatement in Salve's nursing program.

The court will first address the impact of the pending Rule 56 motion on the federal law claims, and will thereafter turn to a consideration of the other (state law) counts.

III. FEDERAL CLAIMS

Both of the claims which arise under federal law founder on essentially the same reefs and shoals: the College is not a "state actor," and its nursing curriculum is not a federally funded "program or activity" within the meaning of the Rehabitation [sic] Act of 1973, 29 U.S.C. § 794. The court need not tarry overlong in putting these claims to rest.

A. *Due Process*

With respect to what the plaintiff envisions as an utter disregard for the niceties (or even the basics) of due process, the court has no need to reach the hotly-debated questions of whether Russell enjoyed any constitutionally protected interest, created by the terms of the Handbook or distilled from any other source. The fifth and fourteenth amendments to the Constitution apply only to the federal government and to the state, respectively – and derivatively, to those whose actions can fairly be attributed to federal or state government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Even where an institution admittedly discriminates in its membership policies, there is no deprivation of due process unless the action in question sufficiently implicates the

state so as to make the conduct "state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

To be sure, if the government plays the role of enforcer for privately originated discrimination, then the government may be forbidden to exercise its police power in furtherance of the discriminatory activity. *Shelley v. Kraemer*, 334 U.S. 1, 18-23, 68 S.Ct. 836, 844-47, 92 L.Ed. 1161 (1948). Or when the web of interconnection between the government and private bigotry is spun tightly enough to conclude that the government agency has "insinuated itself into a position of interdependence" with a discriminatory actor, then the challenged conduct must be subjected to fifth or fourteenth amendment scrutiny. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). Those maxims do not, however assist this plaintiff. The requirement of "state action" demands more than some (modest) interplay between the public and private sectors. Justice Rehnquist's caveat in *Moose Lodge, supra*, is particularly relevant here:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree, whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and

> adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971.

The First Circuit has give further content to this standard in its decision in *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir.1984). There, the court of appeals held that an accounting firm working under a contract with the state was not sufficiently connected with the government to place its conduct within the "state action" rubric. *Id.* at 77. *McGillicuddy* makes it plain that even a close relationship with government does not suffice, absent some meaningful entanglement, to invoke the rigors of due process.

Under *Moose Lodge* and its progeny, no "state action" can be discerned here. The fact that Salve was the recipient of a (rather meagre) library grant is manifestly insufficient to carry the weight of the assertion. The fact that the College's nursing program is, in certain respects, subject to state agency approval is likewise inadequate. In *Moose Lodge*, the discriminatory actor was licensed by the state, but that was not enough to impress the imprimatur of the state on the private actor's bigotry. *Id.* 407 U.S. at 177, 92 S.Ct. at 1973. The "mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the fourteenth amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). *See also Rendell-*

Baker v. Kohn, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982); *Jarrell v. Chemical Dependency Unit of Acadiana*, 791 F.2d 373, 374 (5th Cir.1983). These scraps of evidence, combined, do not turn the state action corner; and the record contains aught else. Though what little has been adduced must be construed in the light most favorable to the plaintiff, it utterly fails to demonstrate the slightest glimmer of the requisite governmental involvement. Accordingly, Count VI cannot stand.

B. *Handicapped Discrimination*

In respect to the plaintiff's statement of claim under the Rehabilitation Act, 29 U.S.C. § 794, the teachings of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), are controlling. In *Grove City*, the Court held that a college which received federal funding only indirectly (that is, through tuition subsidies to students) was not subject in all its departments to the provisions of federal antidiscrimination law. *Id.* at 572, 104 S.Ct. at 1220. A private institution of higher education which, like Salve, receives federal monies exclusively through its students, is subject to federal antidiscrimination laws only with respect to its financial aid program. *Id.* at 574, 104 S.Ct. at 1222. And, it is well to note that, in this case, Russell does not charge that Salve discriminated against her in respect to scholarship assistance or other financial aid.

The plaintiff, although mouthing the empty conclusion that the College's nursing curriculum is a "program or activity receiving Federal financial assistance" as required by 29 U.S.C. § 794, has failed to call the court's

attention to any evidentiary fact which is capable of bearing the weight of that averment.[5] The law is transparently clear: the Supreme Court has decided the point in *Grove City* and has since cited that opinion with approval in the context of the very statute at issue here. *See Consolidated Rail Corp v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984). *See also Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731, 741-42 (D.R.I.1984). Absent proof that federal funding or financial assistance of any kind was involved in the College's nursing program, Russell can mount no cause of action against these defendants under 29 U.S.C. § 794. That being so, the difficult issue of whether Russell's obesity can be considered to be an "impairment" (handicapping condition) within the meaning of 29 U.S.C. § 706(7)(B) need not be reached – and the court expresses no opinion thereon.[6]

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[5] The trivial amounts of money that Salve received to administer so-called Pell Grants and a cryptic reference in a musty document to a "Veterans Administration reporting fee" are at best de minimis. In no way can either of these items – which aggregated well under $3000 – be construed to "fund" the College's nursing program.

[6] In passing, it can be noted that a recent case from the Fourth Circuit provides an interesting perspective on the merits of Russell's discrimination claim. In *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir.1986), an acrophobic plaintiff's handicap claim under the Rehabilitation Act of 1973 was rejected where the plaintiff testified at deposition that his fear of heights had never limited his major life activities. *Id.* at 934. Sharon Russell has testified that she does not consider herself handicapped; indeed her claim that she is well equipped to function as a nurse is central to her count in contract. *See Part IV, post*. The absence of the requisite federal nexus in this case obviates the

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The lack of any showing of the requisite federal subsidization necessitates the grant of *brevis* disposition in the defendants' favor on Count VII of the complaint.

IV. STATE LAW CLAIMS

Conceptually, the plaintiff's claims for wrongful discharge (Count V) and for the transgression of a theoretical (implied) covenant of good faith and fair dealing (Count II) are linked by common ties in the relevant caselaw. So, the court proposes to deal with these initiatives ensemble. The same sort of approach will be taken with respect to the claims for infliction of emotional distress – intentional (Count III) and negligent (Count VIII), respectively – which likewise lend themselves to collective scrutiny. The remaining two state law causes of action will be treated individually.

A. *Dismissal*

The plaintiff's remonstrance in Count V of the complaint, which apparently seeks to draw sustenance from an analogy to the employment relationship, postulates that even a collegian who has no contractual claim to a continuing place in the student body cannot be expelled

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need to balance Russell's denial of her handicapped status against the College's insistence that she cannot perform adequately as a nurse because of her corpulence. The question of whether a person who has the pluck to deny her ostensible handicap may still come within the protection of the Rehabilitation Act because she is perceived by others as handicapped must be left for another day.

without just cause. To be sure, some jurisdictions have evidently created such an open-ended cause of action in favor of at-will employees who have been peremptorily dismissed from their jobs. As an ultimate matter, the plaintiff's claim teeters because of her failure to discover *any* case in *any* jurisdiction from which it might be inferred that such a cause of action (if it existed at all) can – or should – be extended to the university/student context. But in this case, there is no need to speculate upon such a far-reaching extension of the at-will employment doctrine – for the underlying doctrine itself simply does not occupy a place in Rhode Island law.

In the employer-employee environment, no less an authority than the Supreme Court of Rhode Island has recently spoken of the well-settled rule that "a promise to render personal services to another for an indefinite term is terminable at any time at the will of either party." *Rotondo v. Seaboard Foundry, Inc.*, 440 A.2d 751, 752 (R.I.1981). *See also Oken v. National Chain Co.*, 424 A.2d 234, 237 (R.I.1981). Put another way, an at-will employment relationship "creates no executory obligations." *Dudzik v. Lessona Corp.*, 473 A.2d 762, 766 (R.I.1984). This hornbook principle has twice been accepted as an accurate reflection of Rhode Island law by this federal district court. *Lopez v. Bulova Watch Co., Inc.*, 582 F.Supp. 755, 767 n. 19 (D.R.I.1984) (Selya, J.); *Brainard v. Imperial Manufacturing Co.*, 571 F.Supp. 37, 39 (D.R.I.1983) (Pettine, J.). So, by logical extrapolation, Count V stands upon too unsteady a legal footing to survive the instant summary judgment motion.

It would seem that this reasoning and collocation of the authorities writs "finis" as well to the charge contained in Count II of the complaint. After all, the claim that the defendants have breached implied covenants of good faith and fair dealing in the course of terminating the relationship between Russell and the College relies largely on caselaw from other jurisdiction in the employer/employee context, and that authority is of no consequence in Rhode Island. *See ante.* Yes, the claimant responds, this count is sustainable by reference to the decision of the state supreme court in *AAA Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co.*, 121 R.I. 96, 395 A.2d 724 (R.I.1978).

The *AAA Pool* decision is, however, a fetid sinkhole for this plaintiff. In that case, the Rhode Island Supreme Court held that the supposed existence of an implied covenent of good faith and fair dealing did not give rise to any independent cause of action in the property insurance milieu. *Id.* at 726.[7] Although the *AAA Pool* tribunal affirmed the state supreme court's earlier recognition of a generalized duty of fair dealing in contractual relationships, espoused in *Ide Farm & Stable, Inc. v. Cardi*, 110 R.I. 735, 297 A.2d 6443, 645 (R.I. 1972), that generic duty was

[7] Some state courts, including Rhode Island's have created causes of action of this genre in the insurance context. *See e.g., Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I.1980); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973). And, the *Bibeault* rule has been codified by statute. *See R.I.Gen.Laws* § 9-1-33. *Bibeault* by its terms, opens no doors outside of the insurance industry. 417 A.2d at 318-19. Likewise, the statute has no application whatever beyond the insurer/insured relationship.

deemed inadequate to form the basis for an independent cause of action in tort in *AAA Pool*. It is similarly unavailing on the facts of the instant case.

A close look at *Ide Farm* is revealing. There, the state supreme court discerned "an implied covenent of good faith and fair dealing between parties to a (purchase and sale) contract *so that contractual objectives may be achieved.*" *Id.* at 645 (emphasis supplied). The plaintiff in *Ide Farm* sought only to recover the benefit of a bargain foregone when the defendant/buyer failed to meet obligations which had arisen under a purchase and sale agreement. *Id.* at 643. *Ide Farm* did no more than acknowledge the existence of an action in contract for expectation damages against a party who failed to use best efforts to fulfill a promise. Nothing in the case suggests (or condones) the creation of an independent cause of action sounding in tort for consequential damages. The sole thrust of the opinion is toward the achievement of contractual objectives, not toward the establishment of a separate cause of action for punitive or consequential damages for tortious bad faith. Accordingly, *Ide Farm* is barren soil for the present plaintiff.

As mentioned earlier, Rhode Island has consistently rejected the notion that, without more, an action lies in favor of an at-will employee for an unfair or bad faith breach of some covenant implied by law. *See Rotondo, supra; Oken, supra. See also Lopez, supra; Brainard, supra.* Where, as here, the plaintiff was a college student rather than an employee, there is even less reason to believe that the state courts would afford her a right of action of the type which she asserts in Count II of her complaint. In the absence of any respectable precedent from the courts of

Rhode Island favorable to the plaintiff's stance, and in an ambience where no court has intruded into the groves of Academe to reach so ambitious a result, this court cannot retailor state law to suit the plaintiff's specifications. After all, "[i]t is not for this court, sitting in diversity jurisdiction, to blaze a new trial where the footprints of the state courts point conspicuously in a contrary direction." *Plummer v. Abbott Laboratories*, 568 F.Supp. 920, 927 (D.R.I.1983).

There is, under Rhode Island law, no independently actionable covenent of good faith or fair dealing implicit in the university/student relationship. And, Russell has shown nothing which would enhance her case so as to extricate it from the operation of this general principle. The defendants' Rule 56 motion for summary judgment has merit insofar as it pertains to Count II, and must be granted.

B. *Emotional Distress*

Counts III and VIII of the plaintiff's complaint dwell in the realm of emotional distress, the former alleging intentional infliction and the latter claiming injury in consequence of the defendants' negligence.

The court need pause only briefly in its consideration of Count VIII. Rhode Island law controls in this diversity case; and the state supreme court, in *Champlin v. Washington Trust Co.*, 478 A.2d 985, 988 (R.I.1984), has expressly rejected the viability of any cause of action for negligent infliction of emotional distress fashioned along the lines set out in § 313 of the Restatement (Second) Torts. Rhode

Island has been slow to expand the horizons of the (narrowly-defined) cause of action for negligent infliction of emotional harm, *see Plummer v. Abbott Laboratories*, 568 F.Supp. at 922-27 (collecting cases), and Count VIII represents far too ambitious an initiative, given the current state of Rhode Island law. A federal court, of course, "must take state law as it exists: not as it might conceivably be, some day; nor even as it should be. . . . Plaintiffs who seek out a federal forum in a diversity action should anticipate no more." *Id.* at 927.

The early demise of Count VIII does not necessarily sound a death knell for Count III, as the claim asserted therein rests on a different legal footing. In attempting to invoke the standard of the Restatement (Second) Torts § 46, Count III tracks a path which is theoretically viable. Indeed, the state supreme court has heretofore recognized the existence of a cause of action patterned after § 46. *See Champlin*, 478 A.2d at 988.

The basic requisites of an intentional infliction claim are easily stated:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such body harms.

Restatement (Second) of Torts § 46 (1965).

Before addressing any questions related to the conduct alleged and its supposed effects, the court must first determine whether the university/student relationship comprises the kind of soil in which the seeds of a § 46 claim for emotional harm may sprout. We start, again,

with *Champlin*, which recognized a cause of action for intentional infliction of emotional distress in the debtor-creditor context. *Id.* at 989. Any belief that *Champlin* might be limited to its own facts, or to the collection milieu, has been dispelled by the ensuing decision in *Elias v. Youngken*, 493 A.2d 158 (R.I.1985). *Elias* held that some rather unpleasant communications between an employee and his supervisor could, in theory, furnish the basis for a cause of action for intentional infliction of emotional distress (though the particular conduct alleged in *Elias* did not meet the rigorous standard of § 46). *Id* at 163-64. The state supreme court again assumed the existence of this particular cause of action without inquiry into its jurisprudential antecedents or conceptual underpinnings, and considered only the "threshold of conduct," 493 A.2d at 164, at which liability might be imposed. *Id.* at 163-64. Though *Elias* is sparse of phrase, both its language and tenor buttress a broad reading and application of *Champlin*. By extending the potential reach of the tort to the supervisor/employee relationship, *Elias* enhances the (already bright) prospect of construing the scope of § 46 so as to embrace other (kindred) pairings.

The caselaw from other jurisdictions does not suggest any basis for insulating the university/student setting from the operation of the general rule. *See* Note, 38 A.L.R.4th 998, 1003-1030 (1985) (reviewing cases). Without reaching the question of whether Rhode Island would limit the bounds of this tort to some particular sets of relationships, this court is persuaded that the uniquely vulnerable nature of the student's standing in the world of the university places that pairing squarely within the

category of relationships which, on any reasonable taxonomy, would give rise to a duty to avoid the intentional infliction of emotional harm.

Such a conclusion marks only the beginning of the odyssey. While *Elias* and *Champlin* together imply a cause of action for intentional infliction of emotional distress, generally applicable in the circumstances of this case, there are high hurdles along the road to success on such claims. First, the concept of what might be termed "intentionality" is required to do double duty in these precincts. The interdicted conduct itself must be "intentional," that is, purposeful, wilful, or wanton. What is more, the harm that results must also be "intentional," that is, it must have been intended or least recklessly caused.

The face side of the coin is undoubtedly legible in this case. The conduct which the defendants undertook was volitional; what was done, was done purposefully. Whether or not defendants intended the consequences that ensued, the acts that they committed vis-a-vis Russell, were, without exception, the products of forethought and the conscious exercise of free will.

The flip side of the § 46 coin is much harder to read. In the *Champlin* phrase, the challenged conduct "must be intentional or in reckless disregard of the probability of causing emotional distress." 478 A.2d at 989. The plaintiff does not argue that these defendants desired to cause her to suffer, or even that they knew such suffering was substantially certain to follow from their course of conduct. Rather, Russell contends that the concept of recklessness is subsumed within the concept of intentionality

for these purposes. Prosser and Keeton weigh in on plaintiff's side of this issue:

> [L]iability for extreme outrage is broader [than a literal interpretation of intentionality would allow] and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is called wilful or wanton, or reckless.

Prosser and Keeton, *The Law of Torts* (5th ed. 1984) § 12 at 64 (discussing the requirement of extreme outrage).

There are four elements which must coincide under Rhode Island law to impose liability on such a theory:

> (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.

Champlin, 478 A.2d at 989.

Points (3) and (4) are of only passing interest at this juncture. The plaintiff has testified that she suffered nightmares, sleeplessness, nausea, vomiting, diarrhea, gastric upset, and hypoglycemic attacks in the wake of the defendants' conduct. There is ample evidence in the record to withstand Rule 56 scrutiny on the last two prongs of the *Champlin* test. And, the first two prongs can, for the purposes at hand, be viewed as susceptible to measurement by a merged yardstick: reckless disregard *cum* outrageousness. The question becomes whether or

not Russell has proffered enough in the way of proof to create a genuine issue of material fact as to this criterion.

The combined standard is a stringent one. The oft-cited comment (d) to § 46 of the Restatement (Second) of Torts (1965) provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Whether the conduct of a given defendant surpasses the bounds of decency is a function of three factors: (i) the conduct itself, (ii) in light of the particular relationship of the parties, (iii) having in mind the known (or knowable) susceptibility of the aggrieved party to emotional injury. These can best be assayed, in this case, in the inverse order of their appearance. Russell was a known quantity. Despite her evident sensitivity to weight-related emotional trauma, and her documented history of precarious emotional balance and tenuous self-esteem, the individual defendants – well-educated professionals all – plowed ahead. Given the full panoply of

the circumstances, the proposition that they acted in reckless disregard of the probability that an obese youngster's psychic equilibrium could easily be knocked askew seems fairly debatable. This conclusion is fortified by a glimpse of the middle factor. The student stands in a particularly vulnerable relationship vis-a-vis the university, the administration, and the faculty. She is away from home, subject to the authority and discipline of the institution, and under enormous pressure to succeed. The relationship of these parties was such that the defendants could fairly be expected to have acted maturely – and even with some tenderness and solicitude – toward the plaintiff.

Seen in this context, the defendants' conduct, as the plaintiff has portrayed it, cannot be said as a matter of law to stumble on the threshold of outrageousness. To be sure, the law does not shield a person from words or deeds which are merely inconsiderate, insulting, unflattering, or unkind. The courts possess no roving writ which warrants intervention whenever someone's feelings are hurt or someone has been subjected to a series of petty indignities. And, there must be room for some lack of courtesy and finesse in interpersonal relations. In *Champlin*, for example, the state court ultimately declined to impose liability because of the need to afford a creditor "reasonable latitude in the manner in which it seeks to collect overdue notes, even though there may be times when these methods might cause some inconvenience or embarrassment to the debtor." *Champlin*, 478 A.2d at 989-90.

Yet, the behavior challenged here, viewed in the light most favorable to the plaintiff's case, seems to be shaped of sterner stuff. Although a private college must be

afforded wide discretion in enforcing its scholastic standards and in disciplining its students, there is no justification for debasement, harassment, or humiliation. The academic mise en scene, in any reasoned view, is considerably more civilized that the debtor-creditor environment, and there is correspondingly less play for roughness.[8] Given the trust implicit in the student's selection of a college, and the peculiar vulnerability of undergraduates, the facts set forth by the plaintiff, if ultimately proven, comprise a scenario which is far more conscience-provoking than the *Champlin* counterpart. The indignities which Russell asserts have been practiced on her are arguably offensive in the extreme, perhaps repugnant to the norms which one would expect to flourish in the academic world. Taken from the plaintiff's coign of vantage, the behavior in question, if it is shown to be as obnoxious as the plaintiff in her Rule 56 opposition suggests, might well be thought by a properly-instructed jury to be so atrocious as to be actionable. As a general matter, the plaintiff appears to have raised sufficient doubt as to the quality of the defendants' actions to blunt the summary judgment ax. *See Cortes Quinones v. Jimenez Nettleship*, 773 F.2d 10, 15 (1st Cir.1985) (per curiam) (summary judgment inappropriate where the parties "have raised sufficient unanswered questions to require [the] case to go forward with more complete development of the facts.").[9]

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[8] The relationship among students – as opposed to that between the institution and the student body – is a different kettle of fish, not on today's menu.

[9] In pressing their motion for summary judgment as to Count III, the defendants have painted with the broadest

(Continued on following page)

C. *Right to Privacy*

Count IV of the complaint posits a supposed invasion of Russell's privacy. No such cause of action was recognized at common law in Rhode Island. *See Champlin*, 478 A.2d 988 n.2. The General Assembly, however, filled this perceived void in 1980 by the enactment of a statute which is now codified at R.I.Gen.Laws § 9-1-28.1 (1985 Reenactment) (Privacy Act). The Privacy Act,[10] which

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(Continued from previous page)

imaginable stroke. Their asserted position is that Russell has not made out a claim against *any* defendant. The court has now held to the contrary. *See* text *ante*. The next logical question – whether, given the overall viability of the claim, any one or more of the defendants nevertheless deserves immunity because of the absence of evidence of individual culpability – has not been addressed by the movants, and the court will not gratuitously fill the void. *Cf. Blue Cross of Rhode Island v. Cannon*, 589 F.Supp. 1483, 1494 n. 15 (D.R.I.1984) (though motion to dismiss a single count of a complaint has been granted on a ground which probably undercuts certain other counts as well, court will not act sua sponte, but will await the filing of properly-focused motions). Thus, it is not necessary at this juncture to scan the record so as to assess each defendant's contribution (or lack thereof) to the miseries which Russell laments.

[10] The Privacy Act declares in pertinent part:

> (a) Right to Privacy Created. – It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
>
> (1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;

(Continued on following page)

established a "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion," *Id.* at

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> (A) In order to recover for violation of this right, it must be established that:
>
> (i) It was an invasion of something that is entitled to be private or would be expected to be private;
>
> (ii) Such invasion was or is offensive or objectionable to a reasonable man; although,
>
> (B) The person who discloses such information need not benefit from such disclosure.
>
> * * *
>
> (3) The right to be secure from unreasonable publicity given to one's private life;
>
> (A) In order to recover for violation of this right, it must be established that:
>
> (i) There has been some publication of a private fact;
>
> (ii) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
>
> * * *
>
> (B) The fact which has been disclosed need not be of any benefit to the discloser of such fact.
>
> (b) Right of Action. – Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress. . . .

R.I.Gen.Laws § 9-1-28.1(a)(b) (1985 Reenactment).

§ 9-1-28.1(a)(1), must necessarily inform this court's determination of the motion sub judice insofar as the fourth count of the complaint is concerned.

The court treads on near-virgin ground in venturing to interpret this neoteric statutory right. The state supreme court, in a rather cryptic footnote in *Champlin*, 478 A.2d at 988 n. 2, wrote that Ms. Champlin's claim for invasion of privacy was moot because to "establish[] a violation of her right of privacy, [the plaintiff] would have had to satisfy the requirements of § 46" of the Restatement (Second) of Torts (1965). On the facts of *Champlin*, the court seemed to say, the cause of action at common law for intentional infliction of emotional distress merged, as a practical matter, with the statutory claim for invasion of privacy. In support of this proposition, the *Champlin* court cited *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 820, 529 P.2d 104, 110 (1974). To be sure, *Dawson* – which, like *Champlin*, was a debtor-creditor case – did treat the two causes of action interchangeably and held that the stringent standard of liability for intentional infliction of psychic harm should govern the merged claims. In so doing, however, the Kansas Supreme Court relied heavily on the nature of debtor-creditor intercourse:

> When one accepts credit, the debtor impliedly consents for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy. . . . [D]ebtor's tender sensibilities are protected only from oppressive, outrageous conduct.

Id. at 820-21, 529 P.2d at 110.

The *Dawson* court made it clear that the right of privacy is normally governed by the more relaxed standard of liability that requires a finding of conduct "highly offensive to a reasonable man." *Id.* at 822, 529 P.2d at 111. By its allusion to *Dawson* in the *Champlin* footnote, therefore, it would seem that the Rhode Island Supreme Court placed a Restatement § 46 gloss on rights afforded by the Privacy Act only in the (predictably) rough-and-ready precincts in which the relationship of debtor and creditor holds sway. *See McMenamin v. Bishops*, 6 Wash.App. 455, 493 P.2d 1016 (1972); *Lewis v. Physicians, Etc. Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947); *Norris v. Maskin Stores, Inc.*, 272 Ala. 174, 132 So.2d 321 (1961). Yet, the case at bar arises in a far different – and more urbane – sort of institutional context, one which conduces toward reading R.I.Gen.Laws § 9-1-28.1(a)(1) exactly as it was written, thereby providing a remedy for "unreasonable intrusion upon one's physical solitude or seclusion (that). . . . was or is offensive or objectionable to a reasonable man." *Id.* The relationship is such that Russell could reasonably have expected to be granted a considerable degree of privacy as to intimate, personal matters. Thus, a literal reading of the Privacy Act reaches the perimeter of this claim. The court so holds.

Once it has been determined that Count IV states an actionable claim, the record reflects the presence of facts adequate to preclude summary judgment. Section 9-1-28.1(a)(1) does not speak in terms of the "publication" of a private fact, but rather in terms of "an invasion of something that is entitled to be private or would be expected to be private." *See ante.* n. 10. To be sure, there

was nothing private or confidential about Russell's corpulence (it was there to be seen at the most casual glance), so drawing attention to her girth would not, in and of itself, be actionable as an invasion of privacy under Rhode Island law. Yet, there was considerably more here: the continual inquiry into the progress of the plaintiff's diet, the scrutiny of her personal weight loss records, the exaggerated interest in what forbidden morsels Russell ingested, and the preoccupation with her perceived lack of self-discipline, to name but a few variations on the intrusive theme which the defendants played. These provocations coalesce to fit comfortably within the species of conduct which a trier of fact could reasonably find offensive or objectionable. And, this is especially true inasmuch as few things are more personal or private to a young, single person than weight and one's efforts to control it. Accordingly, the Rule 56 motion misfires as to the statement of claim.[11]

D. *Implied Contract*

The final issue to be addressed is the contract claim asserted in Count I.[12] It is accepted law that the

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[11] This is not to say that there is, on this record, a jury question as to whether *all* of the defendants invaded the plaintiff's privacy; it is merely to note the existence of evidence that *one or more* of the defendants may have done so. That being so, and the movants having eschewed any individualized attacks on the sufficiency of the proof, the court need go no further. *See ante* n. 9.

[12] Count I is asserted against the College alone, *see* Complaint ¶19(c); thus, Salve is the only movant in this wise.

relationship between student and university is contractual in nature. *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir.1984); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir.1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). Concededly, the specific character of this sort of contractual relationship is somewhat amorphous. The contract is " 'not an integrated agreement, the standard is that of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Id.* at 202, quoting *Giles v. Harvard University*, 428 F.Supp. 603, 605 (D.D.C.1977); *accord Cloud v. Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir.1983). *See also Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir.) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category"), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 131 (1975); *Napolitano v. Princeton Univ. Trustees*, 186. N.J. Super. 548, 458, 453 A.2d 263, 272-73 (1982) (university/student relationship cannot be described either in purely contractual or associational terms).

If a contract existed, it came into being when Russell matriculated at Salve, and she and the College, as the contracting parties, would be the real parties in interest. The nisi prius roll shows clearly that no express agreement embodied the kind of terms which the plaintiff alleges permeated the relationship. Thus, the court must ascertain whether the implied agreement between the College and its (former) pupil arguably extended far enough to support Russell's present litigation. Upon close

perscrutation, the court finds that the disputed facts surround the terms of the "contract" provided sufficient grist to warrant turning the mill of jury deliberation. The record is not so clear as to entitle Salve to summary judgment on Count I at this stage of the proceedings.

Salve formulates a variety of positions in its search to justify *brevis* disposition of the flagship count of the plaintiff's complaint. In the first place, the institutional defendant asseverates that the scales of "reasonable expectation" should be tipped by the provisions of the Handbook, a pamphlet which admittedly affirms the important parallel between a nursing student's health status and the health of the patients whom the nurse hopes to serve. The Handbook requires each student to inform the clinical coordinator of particular health problems; indeed, nursing students must sign a form for the clinical placement program each semester that vouchsafes full disclosure of all medical abnormalities. And, the Handbook reserves to the coordinator discretion to determine whether a student's participation in the clinical program is contraindicated because of health. The standardized form signed by all students states: "I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the Clinical Area." The College has an obvious interest in ensuring that a student poses no health risk to herself or others as she proceeds into a clinical placement. But, howsoever rational the College's generalized requirements might be, the application of those requirements in Russell's case is another matter.

Contagion was not legitimately at issue – after all, there is no allegation of communicable corpulence here –

nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing.

The only possible bases for prohibiting the plaintiff from clinical training were either (i) that her obesity would impede satisfactory performance of her duties, or (ii) that her appearance would be a poor example for patients.

The college cannot plausibly argue, however, that Russell was bound unconditionally to accept the decision to exclude her from further participation in the clinical placement program, regardless of how arbitrary or irrational that decision might have been. As a matter of Rhode Island law, "[t]here is no doubt that ordinarily if one exacts a promise from another to perform an act the law implies a counter promise against arbitrary or unreasonable conduct on the part of the promisee." *Psaty & Fuhrman v. Housing Authority*, 68 A.2d 32, 35 (R.I.1949). And, at the very least, the reasonableness of either of the possible lines of thought limned above is open to serious question.[13]

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[13] To the extent that the printed form which Russell completed (under which the clinical coordinator's decision is classified as "final") is material to this issue, the document must be construed strictly, with all doubts resolved against Salve (as the originator of the form). This is true under Rhode Island law, *see Fryzel v. Domestic Credit Corp.*, 385 A.2d 663, 666-67 (R.I.1987); *A.C. Beals Co. v. Rhode Island Hospital*, 292 A.2d 865, 872 (R.I.1972); *Zifcak v. Monroe*, 249 A.2d 893, 896 (R.I.1969), and as a matter of interscholastic jurisprudence, *see e.g., Corso v. Creighton University*, 731 F.2d at 533 (in university-student

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In the circumstances at bar, there are competing inferences which can be drawn. There is evidence which, if credited, tends to show that Russell's girth did not reduce her proficiency. The argument that her overweight condition was deleterious to patients as a matter of example rests, at this point, on sheer speculation. Accordingly, the decision to expel Russell, insofar as it prescinds from the Handbook, must be tried to determine whether it was the product of reason or caprice. Summary Judgment would be an inappropriate means of resolving the conflict.

The second morsel in Salve's Count I cupboard is equally unavailing. In a nutshell, the College argues that Russell failed one of the courses prerequisite to completion of her nursing degree, thereby justifying her dismissal and eliminating the need for further inquiry. Yet, there is evidence that the instructor admitted that all of Russell's deficiencies in this course were "directly related" to the claimant's obesity. On this record, a genuine question exists as to whether adiposis was, in Russell's case, a legitimate impediment to due fulfillment of the clinical requirements of the nursing program (as Salve maintains), or whether the College's evaluation was tainted by an unreasonable aversion to obesity or by a desire to expel Russell because she did not conform to the "Salve image."

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relationship where "contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party").

There is considerable evidence in the record attesting to the plaintiff's competence as a student and as a nurse, notwithstanding her one negative evaluation by the defendant Lavin. On August 20, 1985, just one day before Chapdelaine's billet-doux was authored, the plaintiff's supervisor at Hartford Hospital, Patricia Reilly, wrote that she "looked and acted in a very professional manner. Her attendance was excellent and her performance very good. I would be most pleased to hire her as a professional nurse. In fact, I expect to be able to offer her a position for June of 1986." After her dismissal from the College, Russell was promptly admitted to the nursing program at St. Joseph's College (also operated by the Sisters of Mercy). She completed the program there without incident.

While the court is sensitive to the importance of academic freedom and recognizes that deference must be accorded to the reasonable judgment of responsible College officials, the question of reasonableness is in too precarious a balance here to permit summary disposition. Faced with contrary opinions from qualified health care professionals and particularized allegations of personal animosity born of obesophobic obsession, this issue, viewed in the manner most hospitable to the plaintiff's case, survives Fed.R.Civ.P. 56 scrutiny.

The same sort of reasoning applies to the claim that Russell, having signed a document which pledged a weight loss of two pounds per week as a condition of continuing her studies in the College's nursing department, *see* Appendix, was open to ouster for her failure to abide by her written promise. (After all, the Contract itself provided that a failure to achieve the stated goal

would result in "voluntary and immediate withdrawal from the nursing program at Salve Regina College.") But, though it is beyond dispute that the plaintiff did not shed the required poundage, issues of material fact exist as to duress, coercion, and her state of mind, generally, upon the execution of the document. Moreover, as the plaintiff notes, there was no readily ascertainable consideration for her promise. If certain (arguably plausible) inferences are drawn in the manner least favorable to the movant, the weight loss covenant can be seen not as an avenue of defense, but as a product of the invidiously discriminatory course of conduct which the defendants displayed in Russell's case. Finally, the oxymoronic concept of a student essaying a "voluntary withdrawal" against her will, *cf. Chang v. University of Rhode Island*, 606 F.Supp. 1161, 1237 (D.R.I.1985), itself stirs doubts.

In sum, the Contract is at best a useful piece of evidence to assist in constructing the jigsaw of contractual terms, and at worst a piece of paper which is meaningless except as proof of the defendants' malevolence. In any event, it is not dispositive, as a matter of law, of the merits of Count I. It is impossible to apply the standard of "reasonable expectation," *Lyons*, 565 F.2d at 202, to Russell's situation without the aid of precisely the sort of factfinding which battens the Rule 56 hatch. Inasmuch as the viability of Russell's breach of contract claim will depend on the resolution of questions of disputed fact, *brevis* disposition must be withheld on this count.

V. CONCLUSION

The problems presented by this lawsuit are weighty in every sense of the word. The case emphasizes the

uncertain configuration of the boundaries which surround important, but markedly different, values: the necessarily broad freedom which academic administrators must possess in order to operate institutions of higher learning, the rights of a student of tender years to be sheltered from gratuitous debasement or intrusiveness (or worse, from malicious conduct which offends fundamental notions of human decency), the standards of behavior which a university and a undergraduate can reasonably expect from each other. At this relatively early stage of the instant litigation, it remains somewhat unclear as to precisely where on this dimly-lit terrain the College's conduct vis-a-vis Russell falls. So, the illumination of further factfinding seems essential in order to clarify certain of the issues and to map the rights and liabilities of the parties more exactly.

In summary, the court holds that the defendants, and each and all of them, have demonstrated an entitlement to summary judgment in their favor on Counts II, V, VI, VII, and VIII of the complaint. There are, as to these initiatives, no genuine questions of material fact. For the reasons stated, the defendants deserve to prevail thereon as a matter of law. Conversely, the motion for summary judgment must be denied as to Counts I, III, and IV of the complaint. Russell has shown enough steel to put the defendants (or some of them, *see ante* nn. 9, 11) to their mettle on these claims.

The motion for summary judgment is *granted in part and denied in part*, as outlined above. As to those counts upon which the defendants have prevailed, entry of final judgment shall be withheld pending disposition of the

remaining claims. Fed. R. Civ.P. 54(b). *See Bank of New York v. Hoyt*, 108 F.R.D. 184, 186-87 (D.R.I.1985).

It is so ordered.

APPENDIX

CONTRACT

I, Sharon Russell, agree to the following conditions for continuing in Nursing 312 during the Spring 1985 Semester. I understand that failure to meet any and all of these conditions will result in my voluntary and immediate withdrawal from the Nursing Program at Salve Regina College thus making me ineligible for Nursing 411.

1. Maintain a minimum weight loss of 2 pounds per week effective immediately.
2. Report to Mrs. Chapdelaine or Faculty Secretary weekly (every Friday morning) with evidence of progress in weight loss program. This will commence January 25, 1985.

   NB – Report January 22nd for first accounting after the holiday.
3. Maintain academic standing as required.

Additionally, I will be aware of all requirements listed in the Nursing Department Handbook, 1983-85 Edition.

/s/ Sharon Russell
Sharon Russell
Dec. 18, 1984
Date
/s/ Catherine E. Graziano, RN
Witness

JOINT STATEMENT FILED FEBRUARY 13, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL	:	
	:	C.A. No. 85-0628 S
v.	:	
SALVE REGINA COLLEGE et al	:	

JOINT STATEMENT

Now come the parties in the above-captioned action, and in accordance with paragraphs 4 and 5 of the Court's jury pre-trial order hereby make the following joint statement.

1. Trial counsel for each party shall be the following individuals:

   (a) Donald J. Packer for Plaintiff; and

   (b) Steven E. Snow for all Defendants.

2. The following is a concise summary of the respective positions asserted by each of the parties as to all issues:

In accordance with the Court's opinion and order dated November 17, 1986, summary judgment has entered for defendants with respect to several causes of action (Counts II, V, VI, VII, and VIII) set forth in plaintiff's complaint. Accordingly, three claims (Count I, breach of contract; Count III, intentional infliction of emotional distress; and Count IV, invasion of privacy) remain for trial by jury. With respect to these remaining claims, plaintiff contends that Salve Regina College breached its contract with plaintiff by refusing to permit her to continue in the Clinical Nursing Program during

her senior year at the College. Plaintiff contends, in this regard, that she had a contract with the College the import of which was that if she maintained her grades and academic standing, paid her tuition, was not a disciplinary problem, and otherwise complied with the rules and regulations of the College and its Nursing Program, she would be allowed to continue her nursing education at the College and receive her nursing degree therefrom. Plaintiff asserts that she complied with these terms and conditions, but that the College breached the contract by arbitrarily and capriciously declaring plaintiff to be ineligible for the senior year clinical year program.

Plaintiff alleges further that the College and the individual defendants engaged in a systematic and calculated pattern of torment, ridicule and harassment of plaintiff because of her weight, and that such course of conduct amounted to an intentional infliction of emotional distress. Finally, plaintiff contends that the course of conduct in which defendants allegedly engaged constituted an unwarranted and unjustified intrusion upon plaintiff's asserted right of privacy.

The College contends that it did not breach the contract between the parties, as such contract is contained in the "reasonable expectations" of plaintiff and the College. The College posits that evidence of such reasonable expectations may be found in the Nursing Department handbook, in the weight loss agreement executed by plaintiff, and in the course of dealings between the parties. Consideration of these factors, the College asserts, reveals that the College had authority, for health reasons, to exclude plaintiff from the clinical component of the

Nursing Program; that plaintiff had not satisfactorily performed the Junior year clinical nursing program for reasons relating primarily to her obesity, resulting in plaintiff's agreement to lose weight as a condition of continued enrollment; and that defendant had failed to live up to her weight loss agreement, resulting in her ineligibility to continue in the clinical portion of the nursing curriculum. Consequently, the College contends that the plaintiff had no reasonable expectation of continued enrollment in the clinical component of the Nursing Program.

Defendants deny further that they have intentionally inflicted emotional distress upon or invaded the plaintiff's privacy. Defendants did not torment, ridicule or harass the plaintiff because of her obesity. Rather, defendants assert that their conduct was motivated by concern for plaintiff's well-being, and that defendants' conduct was not outrageous in the ordinary course of human relations. Moreover, defendants dispute that they infringed upon any legitimate expectation of privacy of plaintiff.

3. The following constitutes a listing of all facts established by the pleadings, or by stipulations and/or admissions, and/or not otherwise in genuine dispute:

(a) The plaintiff, Sharon L. Russell, is a resident of East Hartford, Connecticut.

(b) Salve Regina College is a religiously affiliated school of higher education incorporated in the state of Rhode Island. The College is sponsored by The Sisters of Mercy.

(c) In the Fall of 1981, Sharon Russell applied to Salve Regina College as a liberal arts student. She was given a personal interview and was accepted for admission by early decision in December, 1981.

(d) Prior to matriculating as a student in the Fall of 1982, plaintiff filed a health form with the College indicating that her height was 5 feet 6 inches and her weight was 280 pounds. She also indicated that she had a history of menstrual abnormalities and hypoglycemia.

(e) Russell still suffers from hypoglycemia and has been treated medically for the problem. Russell's physician has told her that her hypoglycemia may be related to her weight.

(f) Prior to matriculating as a Freshman, Russell's blood pressure was measured at 150/78. Her pulse rate was 108.

(g) Prior to matriculating as a Freshman, Russell was counselled by her physician with respect to her obesity. Her physician suggested to her that she lose weight, and she was told she was obese.

(h) During her Freshman year, Russell went to the College's health service because she wanted to lose weight. On November 30, 1982, when she first went to the health service, she weighed 307 1/4 pounds. On December 6, 1982, her recorded weight at the health center was 306 pounds. Russell's recorded weight at the College's health services was 315 pounds on January 25, 1983. That was the last time she went to the health services asking to be weighed.

(i) In April, 1983, Russell applied for and was granted admission as a candidate to the Nursing Program at the College. Russell understood that to be a candidate meant that one had to fulfill the requirements stated in the Nursing Handbook, a copy of which was given to her.

(j) On the first day of her entry into the Nursing Program, Ms. Russell's advisor, Mrs. Barbara Dean, asked to speak to her. Mrs. Dean told Ms. Russell that "I am concerned about your weight," and "You know Sharon, I just don't know if we are going to get a uniform to fit you." Russell was aware of the requirement of the Nursing Program that all students in the clinical area have a school uniform. Dean also told Russell that she would have to do something about her weight. Mrs. Dean told Sharon Russell that she was concerned about her weight for health reasons.

(k) After her conversation with Mrs. Dean, Ms. Russell spoke to defendant Lavin and told her that she wanted to switch advisors. She felt that Mrs. Dean was picking on her. Russell asked Ms. Lavin to become her advisor and Lavin agreed. Lavin also told Russell that she was perceiving the situation incorrectly and mentioned that losing weight would be beneficial for Russell's health in her opinion. Russell agreed with Lavin that it would be a good idea for her to lose weight. Mrs. Lavin also told Russell that it was important for Russell to think about her weight in terms of the health care profession. There was some discussion concerning a nurse's position as a

role model, and Lavin explained her own experiences of needing to lose weight.

(l) Mrs. Dean's only other discussion with Russell concerning her weight was an occasional inquiry as to how her diet was progressing. Russell felt it was none of Mrs. Dean's business.

(m) In the beginning, Russell perceived Lavin's role in encouraging her to lose weight as supportive.

(n) Russell did not lose weight during her Sophomore year, the first year in the nursing curriculum.

(o) During the second semester of Russell's Sophomore year, Sister Maureen Hynes was Russell's nursing laboratory instructor. The relationship was "going fine" until something happened and Russell got upset. Sister Maureen demonstrated taking blood pressure using Ms. Russell as a model because Ms. Russell's partner was having difficulty getting the correct reading from her. Russell did not think it was inappropriate for Sister Maureen to have done this because the partner was Russell's friend. Sister Maureen talked to Russell concerning her weight and talked about the health problems and health risks associated with obesity.

(p) All defendants told Russell about the health risks associated with obesity. Russell does not deny that there are health risks associated with obesity.

(q) Russell perceived Sister Maureen Hynes' role as giving her information.

(r) In the Spring of 1984, Russell ordered a school uniform in size 48. At or about that time, Ms. Joan Chapdelaine discussed clinical health requirements with the Sophomore class, including Sharon Russell. Mrs. Chapdelaine was in charge of the clinical placements for Junior and Senior students. Mrs. Chapdelaine talked about health requirements of the program and asked all students to sign a clinical health policy form. The form signed by Sharon Russell on April 12, 1984, states:

> I agree to inform the Nursing Department Chairman and the Clinical Agency Coordinator of any health problems I am currently experiencing or have been treated for recently (including the vacation period) as well as of any medication I am taking. In addition, I will provide documentation from my medical source regarding that condition, my treatment and my limitations. I will accept the decision of the Clinical Agency Coordinator and Department Chairman as final as to whether or not I can function in the clinical area. Whenever necessary, the Department Chairman and Clinical Agency Coordinator will have access to the medical records maintained by the College health services.

(s) At or about the same time, Mrs. Chapdelaine passed out a form to the Sophomore class, including Sharon Russell, that asked for particular health information including height and weight. Sharon provided the information to the Clinical

Agency Coordinator which indicated that her height was 5 feet 7 inches and her weight was 270 pounds.

(t) A few days later, in May, 1984, all Sophomore nursing students were weighed and measured by the Clinical Agency Coordinator, Mrs. Chapdelaine. Russell's weight was 328 pounds, 58 more pounds than Russell had indicated on her health form.

(u) In May, 1984, Russell promised Mrs. Chapdelaine that she would try to lose weight.

(v) In the Spring of her Sophomore year, Sharon Russell took a required cardiopulmonary resuscitation ("CPR") course at Salve Regina College. The CPR certificate was a prerequisite to entering the clinical aspects of the Nursing Program. The instructor was Ms. Patricia Murphy. Sharon Russell never completed the course at Salve. Russell later retook the course at the Newport Red Cross and passed.

(w) In August, 1984, Russell was accepted into full status in the Nursing Program. At that time, she received a note from Mrs. Graziano, Chairperson of the Department of Nursing. Russell had made promises to members of the nursing faculty that she would try to lose weight.

(x) Sharon Russell had an opportunity to read the Nursing Handbook before she accepted admittance into full status in the Nursing Department. Russell was aware of the College's philosophy that students should grow to become their

best selves, and was aware that this requirement applied to her professionally as well as personally. Russell was also aware that the handbook stated that Clinical Agency Coordinator and the Department Chairperson reserved the right to make the determination as to whether a student met the health requirements and was able to enter into the clinical program.

(y) When Russell began her Junior year in September, 1984, she had to reorder a larger uniform, size 52.

(z) Mrs. Lavin was Sharon Russell's clinical instructor during the Fall semester, 1984. At that time, Russell felt that Mrs. Lavin was being helpful and supportive with respect to her need to lose weight. Early that semester, there was a problem at St. Luke's Hospital, where Russell was assigned for clinical training, because she was unable to fit into the extra-large sterile scrub gowns provided by the hospital. The hospital made a temporary exception which permitted Russell to wear a sterile doctor's gown (open in the back) as long as she was trying to obtain a proper gown. Russell was not able to conform with sterile scrub procedure because she could not lift the sleeves of the doctor's gown over her arm to her elbows. Proper sterile procedure in the Delivery Room mandated scrubbing to the elbows. Mrs. Lavin said she was sorry that the problem had arisen and assisted Russell in procuring a proper gown.

(aa) Obesity and obesity-related health problems were subjects in Russell's nursing

curriculum. Russell understood the risks of cardiovascular problems, diabetes, muscular joint problems, and other risks and health problems associated with obesity.

(bb) During her Junior year in clinical classes, Russell openly discussed her attempts to lose weight. Russell felt that she could control her own eating and that she was determined to control her own eating and lose weight. In order to lose weight, Russell realized that she had to change her eating pattern. In October, 1984, Mrs. Lavin suggested that Russell speak with Dr. Joan Mullaney concerning weight loss and behavior modification. Russell had a number of conversations during the Fall, 1984 semester with Mrs. Lavin concerning her weight. Lavin expressed concern to Russell about Russell's failure to internalize health information she was receiving in class.

(cc) After her meeting with Dr. Mullaney, Russell complained to Mrs. Graziano, the Chairman of the Nursing Department, claiming that she had been verbally abused by Dr. Mullaney. That was on or about October 17, 1984. Mrs. Graziano told her that she was not perceiving the situation correctly. Mrs. Graziano said that she perceived that Dr. Mullaney was there to give Russell instructions on diet and behavior modification and that Dr. Mullaney was there to help Russell. After that meeting, Russell wrote an unsolicited letter to Mrs. Graziano.

(dd) When Russell started Weight Watchers (late October 1984) she weighed 335

pounds, 7 pounds more than when Mrs. Chapdelaine weighed her in May, 1984.

(ee) On December 18, 1984, Sharon Russell had her final clinical evaluations with Mrs. Lavin. Sharon Russell signed a document dated December 18, 1984. She was not threatened with physical harm if she did not sign the document. She was told, however, that if she did not sign the document, she would not be permitted to enter Nursing 312.

(ff) After December 18, 1984, Sharon Russell had no contact with any of the individual defendants other than Mrs. Chapdelaine. Russell first met with Mrs. Chapdelaine pursuant to the December 18 document, in January, 1985. Thereafter, Russell met almost weekly with Mrs. Chapdelaine and Russell regularly showed Mrs. Chapdelaine her Weight Watchers' booklet. Mrs. Chapdelaine maintained a piece of paper in her desk with Russell's weekly weight taken from the Weight Watchers' booklet. On January 20, 1985, when Russell first met with Mrs. Chapdelaine, she weighed 317 pounds. The last time that Russell shared her Weight Watchers booklet with Mrs. Chapdelaine, May 10, 1985, Russell weighed 300.5.

(gg) Russell agreed with Sister Sheila Megley that Russell would meet with Mrs. Chapdelaine over the Summer of 1985 for Mrs. Chapdelaine to continue monitoring Sharon's weight loss. Russell told Sister Sheila that Mrs. Chapdelaine was being supportive of her at times.

(hh) Russell agreed with Mrs. Chapdelaine to meet with her during the summer in order to monitor Russell's weight loss.

(ii) Russell had not told her parents that she had signed the December 18, 1984 document.

(jj) In April, 1985, clinical postings for Nursing 411 were posted with Sharon being on the list.

(kk) Russell did not contact Mrs. Chapdelaine in June, 1985. When Russell last was weighed at Weight Watchers (June 16), she weighed 303.5 pounds. On or about June 26, 1985, Mrs. Chapdelaine called Russell. Russell told Chapdelaine that her weight was now 297. On or about July 18, 1985, Russell wrote to Mrs. Chapdelaine indicating that she had lost about 5 pounds. Her weight recorded at Weight Watchers at that time was 306.5 pounds.

(ll) On or about July 25, 1985, Mrs. Chapdelaine met with Sharon Russell and her mother. Mrs. Chapdelaine informed Russell that it did not look good for her eligibility for Nursing 411 since she had not fulfilled the weight loss goals of the document dated December 18, 1984. Mrs. Chapdelaine told Russell that she was disappointed that Russell had not met with her during the Summer as she had agreed. Chapdelaine said she was very concerned about Russell's lack of progress on her diet. Chapdelaine said that it did not appear that Russell could fulfill the conditions of the "contract".

(mm) On or about August 21, 1985, Mrs. Chapdelaine called Sharon Russell. Russell

told Mrs. Chapdelaine that her weight loss was about the same. Mrs. Chapdelaine said that, under the circumstances, Russell's name was being removed from the list of those eligible to enter Nursing 411.

(nn) None of the defendants said that Russell was a disgrace to Salve Regina College.

4. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 (a) inasmuch as this action is between citizens of different states and the matter in controversy allegedly exceeds the sum or value of $10,000, exclusive of interest and costs. The Court has personal jurisdiction over all of the defendants herein inasmuch as at all times material to this action, they were residents of the forum state. Venue in this action is proper in the United States District Court for the District of Rhode Island pursuant to 28 U.S.C. § 1391 (b) inasmuch as all defendants reside in said judicial district and because the claim arose in said judicial district.

5. The following is a listing of the contested issues of fact:

(a) What constitute the terms and conditions of the implied contractual relationship between the College and plaintiff, and what were plaintiff's reasonable expectations, as manifested by the relationship between the College and plaintiff?

(b) Whether the College breached the terms and conditions of the implied contract between the parties?

(c) Whether plaintiff's execution of the December 18, 1984 document was the result of an exercise of free will or as a result of duress or coercion?

(d) Whether the conduct of defendants, in dealing with plaintiff concerning her obesity, constituted an intentional infliction of emotional dis'ress?

(e) Whether the conduct of defendants, in dealing with plaintiff concerning her obesity, constituted an invasion of plaintiff's asserted right of privacy? and

(f) Whether plaintiff had sustained damages as a result of defendants' alleged wrongful actions? To the full extent currently ascertainable, plaintiff seeks the following damages:

		(payments lost)
$	2,775.00	Tuition paid to Salve for Senior Year (not returned)
$	275.00	Deposit on Newport apartment for senior year (forfeited)
$	35.00	Salve uniform
$	185.89	Salve class ring
		(additional expenses incurred)
$	2,760.00	St. Joseph's tuition (Fall '86)
$	1,318.00	St. Joseph's tuition (Spring '86)
$	945.00	St. Joseph's tuition (Summer '86)
$	6,000.00	Room and board
$	240.00	Parking
$	20.00	St. Joseph's insurance fee
$	10.00	St. Joseph's nursing convention fee
$	80.00	St. Joseph's uniforms
$	350.00	Books
		(medical expenses)
$	700.00	Dr. Klier
$	250.00	Dr. Yordan
$	1,700.00	Dr. Trowbridge – Hartford Hospital
$	200.00	Medications
$	700.00	Anesthesiologist

		(lost wages and benefits)
$	25,000.00	one year plus value of one year's lost time
		in career experience (not capable of specific valuation)
		(pain and suffering)
		A value not capable of specific valuation which Plaintiff feels is to be determined by the jury.
		(Attorneys Fees)
		As provided for under R.I. Gen. Laws § 9-1-28.1

6. The following constitutes a listing of all contested issues of law:

(a) Whether the College breached an implied contract with defendant in withdrawing her eligibility to participate in the Senior year clinical component of the nursing curriculum? Rhode Island law is applicable to this issue;

(b) Whether defendants' conduct constituted the intentional infliction of emotional distress upon plaintiff? Rhode Island law is applicable to this issue; and

(c) Whether defendants' conduct constituted an invasion of plaintiff's privacy? Rhode Island law is applicable to this issue.

7. There are no motions currently pending before the Court. However, defendants contemplate that they may file a motion in limine in order to preclude testimony from plaintiff's medical experts unless plaintiff responds to discovery requests directed from defendants to plaintiff in May, 1986. There are no other special issues

that would be appropriate for determination in advance of trial on the merits.

8. Counsel believe that there are no further matters that would aid in the disposition of this action. Despite diligent good-faith settlement efforts, it appears that this action cannot be settled. Each party has made diligent good-faith efforts (a) to avoid unnecessary, cumulative or duplicative proof; (b) to enter into appropriate fact stipulations and/or stipulations as to the authenticity of documents; and (c) to narrow and simplify the issues, and to obtain admissions of fact and of documents in the interests of eliminating needless taking of evidence.

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CA. No. 85-0628L

SHARON L. RUSSELL

V.

SALVE REGINA COLLEGE, ET AL

Before The Honorable Ronald R. Lagueux, District Judge

[86]

11 APRIL 1989

THE COURT: The matter before the Court is the motion of all defendants for a directed verdict on the three remaining counts in this complaint. Count I is a claim for breach of contract against Salve Regina College. Count III is a claim for intentional infliction of emotional distress against the college and five individuals, and Count IV is a claim of invasion of privacy against the college and five individuals. The five individuals are Catherine L. Graziano, who was the Director of the Salve Regina Nursing Department; Joan Chapdelaine, who was a faculty member and clinical agency co-ordinator for the Nursing Department; Mary Lavin, who was a faculty member; Sister Maureen Hynes who was a faculty member; and Barbara Dean who was a faculty member.

In deciding a motion for directed verdict, I have to view the evidence in the light most favorable to the plaintiff, and draw all reasonable inferences in favor or the plaintiff.

First, let me deal with the Count III claim of intentional infliction of emotional distress. This is a cause of action which is recognized under Rhode Island law. It's of

recent vintage. It arose in the ?"Champlin case where, incidentally, the plaintiff recovered in the action below, tried in Washington County before Judge Cochrane, and the Supreme Court reversed. And in the Rhode Island Supreme Court decision it was pointed out that the cause of action requires outrageous conduct, and that from this outrageous [87] conduct, severe emotional distress must result, and also there must be physical symptomology. The Supreme Court of Rhode Island discussed this cause of action in Elias v. Youngnen, which was, I believe, an employee/employer relationship. The "Champlin case involved a creditor/debtor relationship.

I've had one other occasion to deal with this subject in a case that I tried a couple of years ago on this court involving an employer/employee relationship.

Now the relationship here was that of teacher and pupil, with regard to the various individuals. There must necessarily be a good deal of latitude in a teacher's dealings with a student. Not every sharp retort or verbal thrust against a student should give rise to this cause of action in the courts. We're not even far removed from the days of corporal punishment in the classroom. The function of a teacher in sometimes making unkind remarks towards a student may be to make the student achieve. There must be a great deal of latitude in what can be said by a teacher to a pupil.

In this case, the few instances that the plaintiff complains about during the course of her metriculation at Salve Regina, hardly fit the characterization of outrageous. There was no outrageous conduct, even past the threshold to even get this issue to the jury.

Also, there was no severe emotional distress based on the view of the evidence that I take, and that is viewing it in the [88] light most favorable to the plaintiff.

So there are no factual issues to be decided here by the jury on that count. I'm satisfied as a matter of law that the plaintiff has not presented a case which even can go to the jury on the question of whether all of these defendants intentionally caused her emotional distress. This case falls far short of even a borderline case. Therefore, I direct a verdict for all six defendants, the college and the five individuals on Count III, on the claim for intentional infliction of emotional distress.

Count IV is a claim of invasion of privacy. Frankly, I don't see what invasion of privacy has to do with this case. The only two prongs of the statute which might apply, or which are claimed to apply is the invasion of the plaintiff's solitude, and there was no invasion of solitude in this case. The fact of her weight was an issue, and a legitimate issue, to be discussed with her by the faculty members at Salve Regina College, and it was discussed with her in the light of the requirements of the program at that particular college, in creating nurses who would go to the outside world and be representatives of Salve Regina College. There was no invasion of her solitude, certainly. The discussion of this subject was done in the setting of her education, and there was no publication of private facts to the outside world. It was a matter that was discussed in-house, and was a matter of legitimate discussion and concern, and the Rhode Island statute on invasion of privacy is simply not implicated in this case. Therefore, I [89] grant the motion for directed verdict on

behalf of all six defendants, the college and the five individuals.

That leaves, finally, the first count, which is what this case is really all about, anyway, and that is breach of contract. That count is against the college. I've never had occasion in the past to deal with the contractual relationship between a student and a college. I did some years ago as a Superior Court Judge have some very interesting litigation involving a contractual relationship between a professor and a college, and the Supreme Court and I had some disagreement. They forced me to decide the case twice. For the interested, the case is called Drans v. Providence College. It involved the question of tenure, and mandatory retirement.

It is clear that the Rhode Island Supreme Court has a vision of the law that indicates that there's something more than a contractual relationship involved when you're dealing with a college or an institution of higher learning, and in the Drans case, they gave an indication that there was sort of a common law of academia which I never quite understood. I can understand it to some degree, because for example, in the student college relationship, although it is based on contract, there is not a nice neat contract to look at to determine what the rights and obligations are on both sides. There's a college handbook and there's a catalog, and there are a lot of other things that are really incorporated into the contractual relationship, and [90] precisely what the parameters are of the contract are sometimes difficult to determine in a particular case. So there is some embellishment in the law to the basic contractual relationship.

Not only are there express contract facets of a relationship, there are also implied contract facets of the relationship, because not everything is on paper. There is no question that this plaintiff as a student at Salve Regina College had a contractual relationship with Salve Regina College at the time she was dismissed, and I will call it a dismissal because that's what it was, no matter what other polite language might be used.

The basic question is whether Salve Regina College was justified in dismissing this plaintiff after completion of three years, and not allowing her to enter her fourth year, and final year, of the nursing program, towards a degree.

The thrust of the discussion in this case to this point has been the so-called contract of December 18, 1984, but that contract, as it is called, must be viewed in a larger light. I have no difficulty in determining that there was no legal duress involved at the time when the plaintiff was in a room with Mrs. Graziano and Mrs. Lavin. She was between a rock and a hard place, but it's a kind of a position we all find ourselves in during life where we have to make some tough decisions, and some rather quick decisions about our life, and where we're going. She was about to be flunked out. Mrs. Lavin had made a determination, subjective as it was, that the plaintiff did not measure up in her surgical, [91] medical, clinical course, and it was weight related. This is not the type of a course where one gives 90s or 70s or number grades. This was an entirely subjective evaluation which the plaintiff would be receiving, and which, in effect, put her at the mercy of her teachers. There have been a lot of students

over the years, in a lot of colleges, who've had disagreements with their teachers about such matters. Probably everyone in this room has had some disagreement with a mentor over the level of a grade, or whether the grade was satisfactory or unsatisfactory.

The fact of the matter was, the plaintiff had a choice at that point. She could have insisted on her rights and said I will not sign such an agreement, I don't think my weight has anything to do with my performance, and if you flunk me out, I'll see you in court. On the other hand, she had the choice of getting a satisfactory grade because Mrs. Graziano and Mrs. Lavin thought that she deserved another chance if she would conscientiously attempt to lose weight. Getting someone to make that commitment on paper is a useful tool.

The plaintiff made that choice. She signed that document, and she exhibited a conscientious desire to abide by the terms of that limited document. By her own testimony, it is clear that she started going to Weight Watchers, keeping her booklet, keeping in touch with Mrs. Chapdelaine who was chosen as the weight referee, so to speak, at this point. So that that contract, so-called, became part of the overall contractual relationship between the [92] parties, although it was only one portion of the overall relationship.

So, although I'm satisfied that there was no duress in the legal sense, which would vitiate the approval which she gave, I see this case in a larger scope than the parties have been seeing it.

In short, I think there is a legitimate question for the jury to decide as to whether the dismissal of the plaintiff

in August of 1985 by Mrs. Chapdelaine, was reasonable and justified, in view of the whole contractual relationship between the college and this plaintiff. In other words, it creates an issue of substantial performance. Neither side has mentioned that phrase in this case, but it is a very important one. It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.

Neither side has talked about substantial performance to this point, but I would expect that they would give me some requests for instructions at the appropriate time on that subject. I will tell you now that I've charged a jury on that subject before, and [93] there's a good deal of Rhode Island law. As a matter of fact, one of the cases that I tried, probably is a Rhode Island Supreme Court decision in this area, and there's the Restatement of Contracts, also.

So it seems to me we have a legitimate factual issue for the jury to determine. The ultimate fact of whether there was substantial performance by the plaintiff in her overall contractual relationship at Salve Regina seems to me, under these circumstances, is an issue to be determined by the jury, and therefore, I deny the defendant Salve Regina's motion for directed verdict on Count I, and that remains the only issue in this case.

It's late in the afternoon, do you want to start your case tomorrow morning?

MR. SNOW: I'd prefer that, tomorrow morning, yes, your Honor.

THE COURT: All right. We can let the jurors go. Tomorrow morning we can start at 10 o'clock. 10 o'clock tomorrow morning.

(Court adjourned)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628 L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE ET AL

Before the Honorable Ronald R. Lagueux
District Judge
April 14, 1989

[13] THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply. I recognize that the Rhode Island cases on this subject are largely cases involving construction contracts. The very first case that I recall is Pelletier v. Massey, which is in 49 R.I. 408. That was decided in 1928, and in that case, the Supreme Court of Rhode Island pointed out that in the context of a construction contract, that a contractor would be entitled to an installment payment if it had substantially performed the contract, and the Court in that case, especially pointed out that the trial judge had properly charged the jury in accordance with the doctrine of substantial [14] performance, which was an accepted rule. The Court also stated that whether there was substantial performance or

not was a question of fact to be decided by the jury. There is a more recent case, I believe it's the Ferris case, which also comes up in a construction contract milieu.

Now, I have an advantage that the Court of Appeals doesn't have, and that is I was a state trial judge for 18 and ½ years, and I have a feel for what the Rhode Island Supreme Court will do or won't do. As a matter of fact, I charged at least two juries on the issue of substantial performance in other than construction contract situations, and I am satisfied in my own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for.

So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine [15] of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury.

The defendant also claims that the plaintiff hasn't proved damages. There is ample evidence in the record

from which the jury could determine damages. The measure of damages in this case is a year in the life. That's what the plaintiff was deprived of, a year of her professional life, and therefore, she lost the income she would have made during that year, and she incurred additional expenses for another year of college, because she had to repeat her junior year. So I will charge the jury along that line. And the evidence is quite clear she lost roughly $25,000 in income, because she had to repeat her junior year at St. Joseph's and she lost whatever it was, $3,000 that she had to pay, extra tuition that she had to pay, and other fees, to get that extra year. In other words, if she had gotten the benefit of her bargain, if the jury finds that the college was in breach of contract, the jury will find that the benefit of her bargain was that she would have had a degree in one more year from Salve Regina in nursing, and wouldn't have had to pay for an extra year of schooling, and would have had one year of income. So there is ample evidence from which the jury can determine damages in this case under the benefit of the bargain rule.

For all those reasons, defendant's motion for directed verdict is denied.

JURY INSTRUCTIONS

[81] 14 APRIL 1989

AFTERNOON SESSION

(Jury present)

THE COURT: Good afternoon, everyone. The record will indicate the jurors are all present.

Madam Clerk, would you distribute the verdict sheet, one to the forelady and one to each counsel table and one for yourself.

Madam Forelady and members of the jury, it is now my obligation to instruct you on the law applicable to this case. You will determine the facts then apply the facts to the law as I give it to you, and thereby arrive at your verdict.

You have now heard all the evidence in the case and you have heard the final arguments of the lawyers as well. My duty is to instruct you on points of law. It is your duty to accept these instructions of law and apply them to the facts as you determine the facts to be. As to legal matters, you must take the law as I present it to you. If a lawyer has stated any legal principle during the course of the trial or in argument that is different from anything that I state the law is, of course, you are to follow my instructions. You should not single out any one instruction as stating the law, but you should consider my instructions as a whole when you retire to deliberate.

You should not allow yourselves to be concerned about the wisdom of any rule of law that I state, regardless of any opinion that you may have about the law, or

what it should be. It would [82] violate your sworn duty to base a verdict upon any other view of the law than that which I give you in these instructions.

In this case, the plaintiff is an individual. The defendant is a corporation. The defendant is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide this case using the same impartiality that you'd use in deciding a case between two individuals.

Since the defendant is a corporation, and thus a legal entity, it cannot act except through its officers, agents and employees. Therefore, when I refer to any acts of the defendant in these instructions, I'm referring to the acts of the defendant Salve Regina college through its officers, agents and employees.

Now this is a breach of contract action. The plaintiff's claim and only claim at this point is that she was wrongfully dismissed on April 21, 1985 from the nursing program at Salve Regina College, and that constituted a breach of her contract with the college, and she seeks to recover damages for that alleged breach of contract.

It is necessary that you understand what a contract is, and I will speak about a contract generally. A contract is an agreement between two sides, two parties. Each side promises to do something or to refrain from doing something, and that's what gives a contract what we call in the law consideration, and makes it a valid and binding agreement between the parties, and the [83] parties are required under the law to observe the terms of the contract.

In this particular situation, there is a contractual relationship created when a student is accepted and becomes a full metriculating student at a college. It is a contract between the student and the college. It is not a simple contract to determine the terms because there are so many elements to the contract. In most commercial situations, when there is a written contract, all the terms of the contract are in the writing, and both sides sign it, and then people can look to that document and read it to see what the obligations are. Of course, in the relationship between student and school, there are a number of elements to the contract. Those elements are found in diverse areas. There are student handbooks, there are catalogs, there are written policies of the college, and there are oral understandings between the student and some of the faculty or other employees of the college that all come to form part of the contractual agreement between the student and the college.

Essentially, what the student promises to do is to observe all the rules and regulations and policies of the college, and maintain a satisfactory academic standing as required by the college, and pay all fees of the college. On the other side, the college agrees to educate that student and ultimately in a major field of study, and ultimately grant a degree to that student.

It is clear in this case that there was such an agreement [84] between the plaintiff Sharon Russell and Salve Regina College that extended over some period of time.

This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit

Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on [85] August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at that time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that

she performed adequately, academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point of whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine.

[86] To aid you in arriving at that determination of fact in this case, there are certain factors that the law states you can consider in arriving at your determination. First of all, you can consider the extent to which the col'ege will be deprived of any benefit which it could reasonably have expected in this contractual relationship.

Secondly, you can consider the extent to which the defendant college can be adequately compensated in some way for the part of the benefit which it will not receive because of the failure of the plaintiff to comply fully.

Thirdly, you can consider the extent to which the plaintiff will suffer a forfeiture of rights or other benefits if you do not find substantial compliance.

Next, you may consider the likelihood that the plaintiff will cure her failure to perform fully, taking account of all the circumstances, including any reasonable assurances given by the plaintiff.

Next, you may consider the extent to which the behavior of the plaintiff comports with standards of good faith and fair dealing.

And, finally, you can consider whether the plaintiff's failure to fully perform was a willful act or not. Considering all these factors, you can make a determination, and must ultimately make a determination, of whether the plaintiff has substantially complied and performed her contractual obligations [87] to the college, and had substantially performed her contractual obligations to the college on August 21, 1985, when she was dismissed from the nursing program.

If you find that she has substantially, or had substantially performed her contractual obligations to the college at that time, then you must necessarily conclude that the college wrongfully dismissed her from the nursing program.

If you find that the plaintiff had not substantially performed her contractual obligations to the college at that time, then necessarily you must find that the college properly and rightfully exercising its rights dismissed her from the nursing program. That's what this case is all about.

Now, in cases of this kind, as I've already said to you, the law places the burden of proof upon the plaintiff. That means simply that the law imposes upon the plaintiff the obligation of proving that which she asserts or claims. In other words, speaking generally, the person who advances a proposition has the burden of sustaining its validity.

The law further requires that the plaintiff prove that which she asserts or claims by a fair preponderance of the evidence. Where evidence adduced either for or against a given proposition outweighs contrary evidence, such evidence is said to preponderate. Therefore, proof by a fair preponderance of the evidence means proof by the greater weight of the evidence.

So when I say to you here that the plaintiff has the burden [88] of proof on any proposition by a fair preponderance of the evidence, I mean simply this, I mean you must be persuaded, considering all the evidence in the case, that the proposition on which the plaintiff has the burden of proof is more probably true than not.

So bringing this case then down to its very simplest terms, ladies and gentleman, in order for the plaintiff to recover in this case, she must have shown you through the evidence that it is more probably than not that she has substantially complied with all her contractual obligations to the college, and that therefore her dismissal from the nursing program on August 21, 1985, was a breach of contract by the college.

Now in order for you to reach a decision in this case, it is necessary that you first determine the facts. You have to determine from all of the evidence put before you

which of the contentions of the adversary parties are true. It is the function of the jury to consider the evidence and to decide from that evidence what the true facts are in the case. It's my duty to decide questions of law and to instruct you on the law, but it's for you to determine the facts and then apply the facts to the law as I have given it to you.

Therefore, the factual situation in this case, what actually happened, took place or transpired between the parties from time to time, is for you to determine, and you alone. It is your recollection and your understanding of the testimony and exhibits [89] that controls, not what the Court or counsel might have said about that testimony and evidence.

It is understood, however, that in determining the facts, you can consider only that evidence properly put before you. If I have kept evidence out by sustaining an objection or granting a motion to strike, that evidence is not before you for your consideration.

If I have allowed evidence in, even over objection, that evidence is before you for your consideration.

Any exhibits that have been marked as full exhibits in this case are full evidence before you and will be available to you in the juryroom for your consideration during deliberations.

Bear in mind that any remarks or statements made by counsel in your presence during the course of trial, or in argument, are not evidence, and should not be considered as such by you during the course of your deliberations.

Now, facts can be proved to you by two types of evidence. One type of evidence we call direct evidence. The second type we call circumstantial evidence. Direct evidence is sometimes referred to as eyewitness evidence because that's the most common type of direct evidence. When a witness testifies to you that that witness saw something, smelled something, tasted something, heard something or touched something, in other words, perceived something by using any of the five senses that we have as human beings, that's direct evidence.

[90] Facts can also be proved by circumstantial evidence. Circumstantial evidence, very simply, is evidence from which you can draw a reasonable inference, or a reasonable conclusion. I use several examples to illustrate circumstantial evidence, and I will use the old saw where there's smoke, there's fire. Think about that. Let's assume that there's no evidence in a case, that there was fire at a particular location, but there is direct evidence that there was smoke at that location, the fact of smoke is circumstantial evidence of the fact of fire, and your reason tells you that that's so. So you can draw an inference, a reasonable conclusion, that where there's smoke, there's fire.

So in this case, if Fact A is proven to your satisfaction, you can draw a reasonable inference that Fact B also exists, although there is no direct evidence on Fact B, if Fact B normally and reasonably follows from Fact A.

So in deciding the facts in this case, what really happened here, you can consider both direct evidence and circumstantial evidence.

Now, a few words to you about the credibility of witnesses. You are the judges of the credibility, the believability of witnesses, and of the weight you will be to the testimony of each. It is your right to consider the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their interest of lack of interest, if any, in the outcome of the case, and their apparent intelligence or lack of [91] intelligence. From these factors together with all the other facts and circumstances proved at trial, you may determine which of the witnesses are the more worthy of belief.

You are not required to believe something to be a fact simply because a witness has stated it to be a fact, if in the light of all the evidence you believe that witness was mistaken or has testified falsely to the alleged fact. If you believe something stated by a witness that proposes something that is inherently impossible when considered in the light of all the evidence, you may disregard that statement, even in the absence of any evidence contradictory of the same.

Now a witness may be impeached, that is to say his or her credibility may be questioned by showing that on some prior occasion that witness made statements on a material issue in the case, which are contradictory of the testimony he or she gives at trial. If you believe from all the evidence that a witness did at some prior time make statements contradicting his or her testimony at trial, you may take this belief into consideration when determining the credibility of that witness and the weight that you will give to that witness' testimony.

If as a result of your deliberations you find that the evidence on the issue of liability weighs more on the side of the defendant, or that the evidence is so equally balanced that you cannot say whether it weighs in favor of the plaintiff or the defendant, then the plaintiff has failed to sustain her burden of [92] proof, and your verdict shall be for the defendant. However, if you find after deliberation that the evidence on the issue of liability weighs more on the side of the plaintiff, then the plaintiff has sustained her burden of proof and your verdict shall be for the plaintiff.

We will now turn to the question of damages. In discussing damages, I do not intend to indicate that I am of the opinion that defendant is liable. You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award as damages, if any, in the event that you do find the defendant liable. Of course, you need consider the question of damages only if you find for the plaintiff, for if you find that the defendant is not liable, no award of damages can be made.

Now damages must be proved. That is to say, the plaintiff must prove her damages by a fair preponderance of the evidence. Therefore, the amount that you may award as damages is subject to limitation in that you may make such award only to the extent that you find damage has been proved by the evidence before you.

You may not speculate or guess as to the amount you will award as damages. You must base that amount upon your consideration of the evidence before you, and it is required that you determine the precise amount which in

your considered judgment constitutes a fair and adequate compensation for such damages as you find have been proved.

In contract cases, there is a well accepted measure of [93] damages, and this is a contract case. If you find that the defendant was in breach of contract, then the money damages you should award are those which will put the injured party, the plaintiff, as close as reasonably possible in the same position she would have been in had the contract been fully performed by the other side. This is called the benefit of the benefit of the bargain measure of damages.

In this case, it's relatively simple. If you find the defendant liable, what the plaintiff lost, what would have been the benefit of her bargain would have been that she wouldn't have lost one year of her professional life. She lost one year of her professional life. Because it took her two years to finish up at St. Joseph's College, and so she lost the income for one year of her professional life, and she had to incur additional expenses for that extra year of college, and that essentially is the measure of damages in this case. You make the factual determinations of what that figure is if you find for the plaintiff.

It is required in order for you to return a verdict in this case that your decision be a unanimous decision of all six of you who will deliberate the case. You cannot return a verdict either for the plaintiff or for the defendant unless all six of you are in unanimous agreement as to what your verdict shall be, and if you find for the plaintiff and determine damages, all six of you must

agree on the precise sum which you will award as damages.

[94] Therefore, in the course of your deliberations and consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction because a majority on the panel holds a contrary conviction, but in pursuing your deliberations, you should keep your mind reasonably open with respect to the points in dispute, and listen to your fellow jurors as they will listen to you, all to the end that you will not be precluded from attaining unanimity by reason of just plain stubborness.

Prejudice, sympathy, or compassion should not be permitted to influence you in the course of your deliberations. All that either side here is entitled to, or for that matter expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you, and an application thereto of the law that has been given to you by the Court.

By giving you these instructions, this Court does not mean to imply that you should approach your consideration of the evidence in an intellectual vacuum. You are not required to put aside or disregard your experiences and observations in the affairs of life. Your experiences and observations in life are essential to your exercise of reasonably sound judgment and discretion in your deliberations, and it is your right to consider the evidence in the light of those experiences and observations, and of course, to use your God-given common sense.

If in the course of your deliberations you should deem it [95] necessary to be further instructed or assisted

by this Court, you should make that fact known to the officer in charge of the jury, who will then make arrangements for your return to the courtroom where you shall make your needs known to me here in open court through your forelady. Should such an occasion arise, that is to say you have a question, or you want some testimony read back to you because you can't agree on what it is, and it is important in your deliberations, don't send me a private note or message. Just simply tell the Marshal you want to come back to the courtroom with a question, he'll bring you back here and the forelady will address your question to me, and I will try to answer it for your right here in open court.

Madam Forelady, your duties are to preside over the deliberations of the jury, maintain order and decorum, give everyone an opportunity to state their views, and take votes when you think that would be productive. Although you, Madam Forelady, have only one vote as every other member of the jury, we need one person to speak for the jury, and that will be one of your important functions.

As you can see from the jury verdict sheet that I've given you, this is a relatively simple case in terms of the amount of verdicts. There's only one verdict to return, it's either for the plaintiff or for the defendant. And if you find for the plaintiff, then you will determine the amount of money to be awarded to the plaintiff for damages.

[96] We have one alternate juror in this case. I'm sorry, sir, that your services are no longer needed in this case. We thank you very much for being part of the jury, for being attentive throughout the trial, and for your

attendance on this trial. You are now discharged from this jury, and you can go on your way when the jury goes in to the juryroom for deliberations. Thank you very much.

The Clerk will now swear in the Marshal to keep the jury together.

(Marshal sworn)

THE COURT: All right. Do you have all the exhibits in one place, Madam Clerk?

CLERK: Yes, sir.

THE COURT: All right. Marshal, can you take those? All right. Before I send you out, ladies and gentlemen, let me tell you what my policy is concerning a deliberating jury so you won't have any question about it. ! will let you deliberate until about 5 o'clock. If you've reached a verdict, of course, before then, you will report it. But if you haven't reached a verdict by 5 o'clock, I will bring you in and I will ask you, Madam Forelady, whether you're close to a verdict. I'm talking about 15 or 20 minutes more of deliberations. If you tell me you're close to a verdict within those parameters, I will send you back out and you can finish up this afternoon. If you tell me you're not, we'll let you go home over the weekend, under instructions, of course, [97] not to discuss the case with anyone, and you can resume Monday morning. So that I want you to know that there are no pressures of time on you in deciding this case. You will have as much time as you need.

All right, Marshal, you may take the jury. Madam Forelady and members of the jury, you just follow the Marshal to the juryroom.

(Jury retired to deliberate at 2:36 p.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 85-0628L

SHARON L. RUSSELL

v.

SALVE REGINA COLLEGE, et al.

Before the Honorable Ronald R. Lagueux, District Judge

[OBJECTIONS TO JURY INSTRUCTIONS]

14 April 1989

[97] THE COURT: Now I will hear any objections to the charge to the jury, and I always look to the plaintiff first.

MR. HOGAN: Your Honor, I should like to have it recorded in the record our objection to two items of the charge. One, that portion which holds the contract, a document of December 18, 1984, to be a valid contract, and two, that part of the charge which incorporates it as a part of the contract between the parties, otherwise, I have no objections.

THE COURT: All right, defendant.

MR. SNOW: Your Honor, on behalf of the defendant, we object to three items. First of all, there's an omission of the list of uncontested facts that the parties had stipulated to as part of the pretrial proceedings. Secondly, the Court's instruction on substantial performance. As we indicated earlier to the Court, we believed that no instruction on substantial performance should have been given. And, finally, on the damage instruction, to the extent that the instruction seems to imply [98] that

the jury could award gross income for one year as damages, we believe it's incorrect. We believe there should have been an instruction that it was net income, net of all expenses that could have been reasonably expected to have been incurred by the plaintiff. Other than that, we have no objection.

THE COURT: The objections of both sides are in the record and noted, and now we will take a recess in this case until the jury returns with either a question or a verdict. I'll ask you to stand nearby so that if there is a question or verdict, we can take it rapidly. Unfortunately, no grass grows on the floor of this courtroom. We have another case scheduled to start immediately, so we will get going with that. We will take a recess then in this case.

(Recess)

(5:00 p.m.)

(Jury present)

THE COURT: Madam Forelady, I presume the jury has not reached a verdict.

FORELADY: No, we have not, your Honor.

THE COURT: All right. Do you think it's possible that you could reach a verdict in the next 15, 20 minutes?

FORELADY: No, sir, I do not.

THE COURT: All right, fine. Thank you. You may be seated. Then I will let you go for the weekend to resume Monday morning at 9 o'clock. Does 9 o'clock present a problem to any of [99] you? All right. We will

resume at 9 o'clock because I want to get you out deliberating and I have Naturalization at 9:30, and other things scheduled at 10, 10:30. Be back in the juryroom at 9 o'clock Monday morning.

I have three basic instructions to give you which I want you to abide by. The first instruction is most important. Do not discuss this case with anyone over the weekend.

Secondly, do not discuss this case among yourselves, between now and Monday morning. Even when you're in the juryroom waiting for me to bring you into the courtroom Monday morning at 9 o'clock, don't discuss it until I send you back out to resume your deliberations.

And, thirdly, if anyone approached you in an attempt to discuss the case, I will want to know that Monday morning because I've got to be sure that the integrity of the jury system is preserved. Now I don't mean, you know, if your wife or husband, family member says what's going on, you can tell them, look, we're still in deliberations, I can't talk about it. That's all right. But if somebody comes up to you and wants to talk about what your deliberating about and so forth, I will want to know that Monday morning. In other words, I want to be sure we all know that there's been no attempted influence upon you in your deliberations.

So three things to keep in mind. Number 1, don't discuss the case with anybody over the weekend; Number 2, don't discuss it [100] among yourselves; and Number 3, if anyone approaches you to discuss the case, I will want to know that, and I will question you Monday morning. I'll bring you back into the courtroom and I'll

ask you these questions to see whether you've complied with these instructions, and I've done it many times, and I've never had a jury who told me that there was any problem, so they resumed deliberations. So I hope you have a good weekend. It's always good to sleep on cases. We've had a long day, and you've heard arguments, you've heard my instructions, you've started your deliberations, and it's really good to sleep on it. I do that a lot when I have to render decisions. I like to sleep on it, come back the next morning. You will have a whole weekend to sleep on it, and Monday morning I'm sure you will be able to come back to deliberations with a fresh outlook. Are there any questions? Any problems? All right, we'll stand in adjournment then in this case until 9 o'clock Monday morning.

(Court adjourned)

JURY VERDICT

17 April 1989

[6] (Recess)

(Jury returns at 2:45 p.m. with a verdict)

(Jury present)

THE COURT: Madam Forelady, has the jury agreed upon a verdict?

FORELADY: Yes, we have, your Honor.

THE COURT: All right. Does the jury find for the plaintiff or for the defendant?

FORELADY: For the plaintiff.

THE COURT: All right, and in what sum for damages?

FORELADY: In the sum of $30,513.40.

THE COURT: All right. $30,513.40.

FORELADY: Correct.

THE COURT: All right. Thank you, Madam Forelady. Does anyone wish the jury polled?

MR. SNOW: Yes, please, your Honor.

THE COURT: All right. What that means is your name will be called individually, and then you will tell us what your verdict is. Rather than have you try to remember the figure, I will tell you that the verdict is for the plaintiff in the amount of $30,513.40 as reported by your Forelady. When you name is called individually, will you

tell us whether that is your [7] verdict, yes or now, individually.

(Jury polled)

AMENDED JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL v. SALVE REGINA COLLEGE, CATHERINE E. GRAZIANO, JOAN CHAPDELAINE, MARY LAVIN, MAUREEN HYNES, and BARBARA DEAN, INDIVIDUALLY, and in their capacity as faculty members	AMENDED JUDGMENT IN A CIVIL CASE CASE NUMBER: CA85-0628L

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the court's decision on motion for a directed verdict and on summary judgment, judgment is hereby entered on the amended complaint for all defendants on Counts II thru VIII.

Pursuant to verdict of the jury on April 17, 1989, on Count I, judgment is hereby entered on the amended complaint for the plaintiff, Sharon Russell against the defendant Salve Regina college, in the amount of $30,513.40 plus interest at 12% per annum from August 21, 1985 to April 17, 1989 totalling $13,390.05, making the total

judgment for the plaintiff in the amount of $43,903.45.

May 22, 1989

April 17, 1989 NUNC PRO TUNC
Date

Frederick R. DeCesaris
Clerk

/s/ Nita E. Andreasen
(By) Deputy Clerk
5/22/89

ORDER DATED MAY 22, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHARON L. RUSSELL Plaintiff	:	
v.	:	C. A. 85-0628 L
SALVE REGINA COLLEGE, et al Defendants	:	

ORDER

This matter came on for hearing on Monday, May 22, 1989, on the Motion of Defendant, Salve Regina College, for Judgment Notwithstanding the Verdict, for a New Trial and/or Remittitur, and for Amendment of Judgment. After submission of memoranda in connection therewith, and oral argument of counsel, and consideration thereof by the Court, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Defendant, Salve Regina College's Motion for Judgment Notwithstanding the Verdict is denied.

2. Defendant, Salve Regina College's Motion for a New Trial is denied.

3. Defendant, Salve Regina College's, Motion for Remittitur is denied.

4. Defendant, Salve Regina College's, Motion for Amendment of Judgment, by agreement of the parties, is granted and the Judgment shall be amended so as to provide for the jury verdict in the amount of $30,513.40 plus interest from August 21, 1985 to April 17, 1989 in the

amount of $13,390.05; resulting in a total judgment of $43,903.45. Said judgment as amended shall be entered nunc pro tunc as of April 17, 1989.

5. By agreement of the parties, execution upon judgment is stayed pending appeal and it is agreed between the parties, and so ordered that neither party need post a supersedeas bond in connection with either the appeal or cross-appeal.

Entered as an Order of this Honorable Court this ___ day of May, 1989.

By Order:

/s/ Janice Cavaco
Clerk

Enter:

/s/ Ronald R. Lagueux
Lagueux, R
U.S.D.J.
5/23/89

Sharon L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellants.

Sharon L. RUSSELL,
Plaintiff, Appellant,

v.

SALVE REGINA COLLEGE, et als.,
Defendants, Appellees.

Nos. 89-1564, 89-1597.

United States Court of Appeals,
First Circuit.

Heard Oct. 3, 1989.
Decided Nov. 20, 1989.

Steven E. Snow, with whom Partridge, Snow & Hahn, Providence, R.I., was on brief for Salve Regina College, et als.

Edward T. Hogan, with whom Hogan & Hogan, East Providence, R.I., was on brief for Sharon L. Russell.

Before BOWNES and TORRUELLA, Circuit Judges, and TIMBERS,* Senior Circuit Judge.

TIMBERS, Circuit Judge:

This consolidated appeal arises from the stormy relationship between Sharon L. Russell ("Russell") and Salve Regina College of Newport, Rhode Island ("Salve Regina" or "the College"), which Russell attended from

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*Of the Second Circuit, sitting by designation.

1982 to 1985. The United States District Court for the District of Rhode Island, Ronald R. Lagueux, *District Judge*, entered a directed verdict for Salve Regina on Russell's claims of invasion of privacy and intentional infliction of emotional distress at the close of plaintiff's case-in-chief, but allowed Russell's breach of contract claim to go to the jury.[1] The jury found that Salve Regina had breached its contract with Russell by expelling her. The court entered judgment on the verdict, denying Salve Regina's motions for judgment n.o.v. and for a new trial. The court also denied Salve Regina's motion for remititur of the damages of $30,513.40 plus interest, a total of $43,903.45, that the jury awarded Russell.

On appeal Russell contends that, because a reasonable jury could have found invasion of privacy and intentional infliction of emotion distress under Rhode Island law, the district court erred in entering a directed verdict on those claims. Salve Regina contends that the judgment that it breached its contract with Russell should be reversed because: (1) the court erred as a matter of law in its analysis of the contract between a student and the college she attended; and (2) even accepting the court's

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[1] This action originally was assigned to then-District Judge Bruce M. Selya. Judge Selya granted summary judgment in favor of the individual defendants on all counts and in favor of Salve Regina on five counts of Russell's complaint: due process, handicapped discrimination, negligent infliction of emotional distress, wrongful discharge and breach of convent of good faith. Russell does not raise the granting of summary judgment as to any of these counts on appeal. Judge Selya denied summary judgment on the three claims that are the subject of this appeal. *Russell v. Salve Regina College*, 649 F.Supp. 391 (D.R.I.1986).

formulation, there was insufficient evidence to support the jury verdict. It also argues that the calculation of damages was incorrect as a matter of law.

For the reasons set forth below, we affirm the judgment of the district court in all respects.

I.

We summarize only facts believed necessary to an understanding of the issues raised on appeal.

By all accounts, Sharon Russell was an extremely overweight young woman. In her application for admission to Salve Regina, Russell stated her weight as 280 pounds. The college apparently did not consider her condition a problem at that time, as it accepted her under an early admissions plan. From the start, Russell made it clear that her goal was admission to the College's Nursing Department.

Russell completed her freshman year without significant incident and was accepted in the College's Nursing Department starting in her sophomore year, 1983-1984. Her trauma started then.[2] The year began on a sour note when a school administrator told Russell in public that they would have trouble finding a nurse's uniform to fit her. Later, during a class on how to make beds occupied by patients, the instructor had Russell serve as the patient, reasoning aloud that if the students could make a

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[2] The facts recited here, which relate primarily to the distress and privacy claims that were the subject of the directed verdict, must be viewed in the light most favorable to Russell. *Bennett v. Public Service Co.*, 542 F.2d 92 (1st Cir.1976).

bed occupied by Russell, who weighed over 300 pounds, they would have no problem with real patients. The same instructor used Russell in similar fashion for demonstrations on injections and the taking of blood pressure.

The start of Russell's junior year, 1984-85, coincides with the time school officials began to pressure her directly to lose weight. In the first semester, they tried to get Russell to sign a "contract" stating that she would attend Weight Watchers and to prove it by submitting an attendance record. Russell offered to try to attend weekly, but refused to sign a written promise. Apparently, she did go to Weight Watchers regularly, but did not lose significant weight. One of Russell's clinical instructors gave her a failing grade in the first semester for reasons which, the jury found, were related to her weight rather than her performance.[3]

According to the rules of the Nursing Department, failure in a clinical course generally entailed expulsion from the program. But school officials offered Russell a deal, whereby she would sign a "contract" similar to the one she rejected earlier, with the additional provision that she needed to lose at least two pounds per week to remain in good standing. The "contract" provided that the penalty for failure would be immediate withdrawal from the program. Confronting the choice of signing the agreement or being expelled, Russell signed.

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[3] Significantly, Russell's other clinical instructor that semester considered her performance outstanding. In addition, Russell's academic record indicates at least satisfactory performance in all courses except the clinical one that she failed.

Russell apparently lived up to the terms of the "contract" during the second semester by attending Weight Watchers weekly and submitting proof of attendance, but she failed to lose two pounds per week steadily. She was nevertheless allowed to complete her junior year. During the following summer, however, Russell did not maintain satisfactory contact with College officials regarding her efforts, nor did she lose any additional weight. She was asked to withdraw from the nursing program voluntarily and she did so. She transferred to a program at another school.[4] Since that program had a two year residency requirement, Russell had to repeat her junior year, causing her nursing education to run five years rather than the usual four. Russell completed her education successfully in 1987 and is now a registered nurse.

Soon after her departure from Salve Regina, she commenced the instant action which led to this appeal.

II.

Subject matter jurisdiction over this case is based on diversity of citizenship. 28 U.S.C. § 1332 (1988). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1988). The parties do not dispute that the law of Rhode Island applies to all substantive aspect of the case.

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[4] Although the record is unclear, it appears that the College told Russell that she would not be eligible to register for her senior year, but could apply for a change of status if she met the College's conditions. Russell instead chose to transfer. At any rate Salve Regina does not dispute that Russell's departure was not truly "voluntary".

We discuss first in section II of this opinion that two claims with respect to which the district court directed a verdict in favor of the College. Then in section III we discuss the contract claim which was submitted to the jury.

(A) *Intentional Infliction of Emotional Distress*

Rhode Island recognizes this tort theory. It has adopted as its standard § 46 of the Restatement (Second) of Torts (1965). *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I.1984). Section 46 states that:

> "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Restatement (Second) of Torts § 46.[5] Rhode Island has added the requirement of at least some physical manifestation. *Curtis v. State Dep't for Children*, 522 A.2d 203 (R.I.1987). Russell has alleged nausea, vomiting, headaches, etc., resulting from the College's conduct. This appears to create a triable issue on the causation and harm elements of the theory. The issue on appeal, therefore, is whether the conduct alleged is sufficiently extreme and outrageous.

In its arguments that the conduct of its employees does not rise to the necessary threshold, the College in

[5] Russell does not allege that the administration of Salve Regina intended to harm her, but rather that they hounded her without regard to the consequences.

essence concedes a pattern of harassment, but argues that the conduct was merely discourteous and necessary to carry out its academic mission.[6] We have no doubt that the conduct was insensitive, but to be tortious it must be "atrocious, and utterly intolerable in a civilized community." *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1021 (1st Cir.) (construing Rhode Island law and quoting Restatement, *supra*, § 46, comment d), *cert. denied*, 109 S.Ct. 65 (1988). Without regard to context, the College is correct; a series of insults, even if ongoing and systematic, is insufficient. But the context – the relationship of the plaintiff to the defendant and the knowledge of plaintiff's special sensitivities – is a necessary element of the tort. Prosser and Keeton, The Law of Torts, § 12, at 64 (5th ed. 1984). The school officials knew very quickly that Russell wanted badly to become a nurse and that she was easily traumatized by comments about her weight; yet they harassed her continuously for almost two years.[7] In this

[6] Regarding the latter point, the College correctly states that both the Restatement and Rhode Island law may excuse otherwise tortious conduct if taken to protect legitimate interests. *Champlin supra*, 478 A.2d at 988; Restatement, *supra*, § 46, comment g. The example provided is that of a heartless landlord exercising his privilege to evict a destitute family for nonpayment of rent. *Id.*, comment g, illustration 14. It is unable, however, to specify the interest served beyond "educational standards". We are unable to see what interest would be served by the petty, mean-spirited and concerted conduct in question. If anything, the interest of a college faculty and administrators should be the creation of an atmosphere of courtesy and tolerance.

[7] Salve Regina claims that an illustration set forth in the Restatement closely parallels this case:

(Continued on following page)

context, comments by school officials about weight were doubly hurtful.

Even considering the context and acknowledging this to be a close question, however, we affirm the district court's directed verdict dismissing the claim. "Extreme and outrageous" is an amorphous standard, which of necessity varies from case to case. The College's conduct may have been unprofessional, but we cannot say that it was so far removed from the bounds of civilization as not to comply with the test set forth in § 46. Russell's commendable resiliency lends support to our conclusion.

(B) *Intrusion of Privacy*

In Rhode Island, this tort is purely statutory; so we refer primarily to the statute itself, especially in light of the lack of case law interpreting the text. The relevant provision, R.I.Gen.Laws § 9-1-28.1(a)(1) (1985 Reenactment), covers only "*physical* solitude or seclusion"

(Continued from previous page)

> "A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A."

Restatement, *supra*, § 46, comment f, illustration 13.

In view of the ongoing nature of the conduct in the instant case, as well as the control Salve Regina held over Russell's professional future, the comparison to an isolated remark, even one made with knowledge of special sensitivity, is disingenuous.

(emphasis added).[8] The conduct at issue here does not fit easily within the scope of that language, since all of it occurred in public. The only area "invaded" was Russell's psyche. We cannot lightly predict that the Rhode Island Supreme Court would interpret the statute contrary to its literal language, in view of the statement of that Court that it will give statutory language its plain meaning absent compelling reasons to the contrary. *Fruit Growers Express Co. v. Norberg*, 471 A.2d 628 (R.I.1984). We therefore affirm the district court's directed verdict on the invasion of the privacy count.

III.

Russell's breach of contract claim is the only one the district court submitted to the jury. The College does not dispute that a student-college relationship is essentially a contractual one. *E.g.*, *Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir.1977), *cert. denied*, 435 U.S. 971 (1978). Rather, it challenges the court's jury charge regarding the terms of the contract and the duties of the parties.

From the various catalogs, manuals, handbooks, etc., that form the contract between student and institution, the district court, in its jury charge, boiled the agreement between the parties down to one in which Russell on the one hand was required to abide by disciplinary rules, pay

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[8] A separate section of Rhode Island's Privacy Law provides the "right to be secure from unreasonable publicity given to one's private life." R.I.Gen.Laws. § 9-1-28.1(a)(3)(1985 Reenactment). Recovery is available, however, only if a private fact is disclosed. The only material fact here, Russell's obesity, of course was quite public.

tuition and maintain good academic standing,[9] and the College on the other hand was required to provide her with an education until graduation. The court informed the jury that the agreement was modified by the "contract" the parties signed during Russell's junior year. The jury was told that, if Russell "substantially performed" her side of the bargain, the College's actions constituted a breach.

The College challenges the court's characterization of the contract. It claims the court ignored relevant provisions of publications from the Nursing Department; for example, those relating to the need for nurses to be models of health for their patients. These provisions, it argues, demonstrate that Russell was aware that success as a nursing student demanded more than competent performance. We hold, however, that the provisions on health speak to the duty of students to inform the Department of hidden health problems that might affect the students or their patients, and they are not a license for administrators to decide late in the game that an obese student is not a positive model of health.[10]

Salve Regina also challenges the application of strict commercial contract principles, *e.g.*, that, if Russell

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[9] There is no dispute that Russell met these criteria, with the exception of the clinical course she failed because of her weight.

[10] Judge Selya stated that "[c]ontagion was not legitimately at issue – after all, there is not allegation of communicable corpulence here – nor have the defendants essayed any showing that clinical work would have jeopardized Russell's own wellbeing." *Russell, supra,* 649 F.Supp. at 405.

substantially performed, the College had an absolute duty to educate her.[11] It cites several cases which hold that colleges, in order properly to carry out their functions, must be given more contractual leeway than commercial parties. *E.g., Lyons, supra,* 565 F.2d at 202 (dean may reject faculty recommendation to reinstate student); *Slaughter v. Brigham Young Univ.,* 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975); *Clayton v. Trustees of Princeton Univ.,* 608 F.Supp. 413 (D.N.J.1985) (university must have flexibility to discipline cheating students). There can be no doubt that courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matter of curriculum and discipline. *Slaughter, supra,* 514 F.2d at 627 ("substantial performance" standard is intolerable when it allows student to get away with "a little dishonesty").

The instant case, however, differs in a very significant respect. The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention

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[11] The College also argues that the jury finding of substantial performance is not supported by the record. We hold that the record demonstrates that the finding is not clearly erroneous.

that a court cannot use the substantial performance standard to compel an institution to graduate a student merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action. *Slaughter, supra*, 514 F.2d at 626.

In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir.1984); O'Rourke v. Eastern Air Lines Inc., 730 F.2d 842, 847 (2d Cir.1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error.

IV.

Salve Regina argues that the $25,000 damages awarded to Russell (the equivalent of a year's salary) constitutes legal error.[12] It contends that she is entitled to $2,000, representing her net savings after one year of employment. We disagree.

Since there appears to be no case law on this precise point,[13] we turn to familiar principles of contract law. The

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[12] The remaining damages, $5,513.40, constitute the costs incurred for Russel's additional year in college.

[13] The College's reliance on *Slaughter, supra*, is unavailing. The *Slaughter* court merely held that, because the substantial

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purpose of a contract remedy is to place the injured party in as good a position as it would have been in had the breach not occurred. *Rhode Island Turnpike and Bridge Auth. v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344, 357 (1977). Since each case turns on the specific facts at hand, we consider it appropriate to accord the district court reasonable leeway. 5 Corbin on Contracts § 992 (1964 ed.).

Here, the district court's jury charge stated specifically that the proper remedy for the breach in question would be a year's salary. We cannot say that this was incorrect as a matter of law. The contract between Salve Regina and Russell was not motivated by economic concerns, at least on Russell's part; yet its breach clearly damaged Russell. She lost a year of her professional life. Under the circumstances, the salary Russell would have earned in that lost year strikes us as hardly a windfall. Moreover, the most closely analogous cases, involving damages for wrongful employment termination, hold that a plaintiff is entitled to the full salary, less any amount he was under a duty to mitigate. 5 Corbin, *supra*, § 1095 (collecting cases). We therefore affirm the damage award.

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performance standard was inapplicable on the facts, it was improper to award the plaintiff the amount he would have earned had he received his doctorate earlier. 514 F.2d at 626. We are faced with the reverse situation: substantial performance in fact and proper application of the standard.

V.

To summarize:

We hold that the district court properly granted a directed verdict in favor of Salve Regina on the intentional infliction of emotional distress and invasion of privacy counts. We affirm the judgment in favor of Russell on the breach of contract count. We also affirm the damage award on the contract count.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1564

SHARON L. RUSSELL,
Plaintiff, Appellee,

v.

SALVE REGINA COLLEGE,
Defendant, Appellant.

No. 89-1597

SHARON L. RUSSELL,
Plaintiff, Appellant.

v.

SALVE REGINA COLLEGE, ET AL.,
Defendants, Appellees.

Before

Campbell, *Chief Judge*,
Bownes, Breyer, Torruella, Cyr, *Circuit Judges*, and
Timbers*, *Senior Circuit Judge*

ORDER OF COURT

Entered: January 16, 1990

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*Of the Second Circuit, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Francis P. Scigllano

Clerk.

NOTE: Honorable Bruce M. Selya has recused himself.

[cc: Messrs. Snow and Hogan]
